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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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Dated: September 2, 1987

Question Presented

Whether in order to prevent the avoidance of tax by non-Indian purchasers of motor fuel from Indian retailers, the State of New York may require the Tribe's motor fuel distributor to precollect and pay over to the State the applicable motor fuel and sales taxes.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

The petitioners, the State Tax Commission of the State of New York, Roderick G.W. Chu, as Commissioner of Taxation and Finance of the State of New York and the

Department of Taxation and Finance of the State of New York, respectfully pray that a writ of certiorari issue to review the order of the New York State Court of Appeals entered in this action on May 7, 1987.

Opinions Below

The opinion of the Court of Appeals, which reversed the order of the Appellate Division, Third Judicial Department and remitted the case to that court for further proceedings, was rendered on May 7, 1987. The opinion is reported at 69 NY2d 536 (1987). It is set forth as Appendix "A".

The opinion of the Appellate Division was rendered on July 31, 1986. The opinion is reported at 122 AD2d 518 (3d Dept 1986). It is set forth as Appendix "B".

The opinion of the Supreme Court, Albany County, was rendered on February 25, 1986. The opinion is not reported. It is set forth as Appendix "C".

The opinion of the Appellate Division following remittance was rendered on July 16, 1987. The opinion is not yet reported. It is set forth as Appendix "D".

Jurisdiction

The order of the Court of Appeals was entered on May 7, 1987. By order dated July 28, 1987, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including September 4, 1987. This petition for certiorari is filed within that time. The Court's jurisdiction to review the case rests upon 28 USC § 1257(3).

Statutory Provisions Involved

25 USC §§ 261-264; New York Tax Law §§ 282(1); 283(1), (3), (7); 284(1); 284-a; 284-c; 285-a; 286(1); 287; 289-c; 1101(b)(4)(ii); 1102; 1132(c); 1134; 1135; 1136; 1137; 1139. These provisions are set forth in pertinent part as Appendix "E".

Statement of the Case

This case involves questions pertaining to the taxation of motor fuel delivered to Indian retailers but sold to non-Indians. Broadly, Articles 12-A and 28 of the New York Tax Law impose excise and sales taxes upon motor fuel which is imported and sold within the State (Tax Law, §§ 284, 284-a, 284-c, 1101[b][4][ii], 1102 [effective June 1, 1985], 1105). In the first instance, the taxes are assessed to and collected from the distributor.[1] The distributor includes the amount of the tax in its wholesale price, and the retailer, in turn, passes the tax along to the ultimate consumer. In cases where the ultimate consumer is an Indian, or is otherwise exempt from taxation, the taxes are refunded or a credit is given (Tax Law, §§ 289-c, 1139). Thus, no direct tax is imposed upon either the distributor or the Indian retailer or purchaser, but only upon the non-Indian purchaser. As the court below stated, the burden and legal incidence of the tax falls on the non-Indian consumer (A8).[2]

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[1]The term "Distributor" is defined at section 282(1) of the Tax Law to mean "any person, firm, association or corporation, who or which imports or causes to be imported into the state for use, distribution, storage or sale within the state, any motor fuel; * * *".

[2]Numbers in parentheses preceded by the letter "A" refer to pages of the appendix.

Respondent Herzog Brothers Trucking, Inc. ("Herzog Brothers") is a Pennsylvania corporation which is engaged in the business of, among other things, the wholesale and retail sale of motor fuels. Commencing in June, 1984, Herzog Brothers began importing motor fuel into New York State and selling it at wholesale to Indian retailers on the Seneca Nation of Indians' Allegany and Cattaraugus Reservations. Although the respondents were aware of the fact that Articles 12-A and 28 of the Tax Law required wholesale distributors and vendors of motor fuels to register and file a bond with the Department of Taxation and Finance as a precondition of doing business in New York and required distributors and vendors to maintain and file records with respect to their sales of motor fuels in New York and to pay the applicable taxes (Tax Law, §§ 283, 286, 287, 1134, 1135, 1136, 1137), they refused to comply with the law in any respect.

After an audit revealed noncompliance with the Tax Law, respondents were assessed for both taxes.[3] However, prior to the completion of the administrative proceeding, and on or about November 27, 1985, the respondents commenced this action in the New York Supreme Court for declaratory, affirmative and injunctive relief. The respondents sought, in addition to injunctive relief, a declaration (1) that the application of the provisions of the New York Tax Law relating to the taxation of gasoline and motor fuel, and the regulation of distributors and vendors of such motor fuel, were unconstitutional as applied to them, and (2) that by reason of the Indian trader statutes, 25 USC §§ 261-264, the State was without power to require them to register as distributors or vendors pur-

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[3]The audit revealed that between June 1, 1984 and May 31, 1985, respondents imported and sold a total of 3,053,245 gallons of motor fuel. The total motor fuel tax due and owing for the period was $244,259.60, plus penalty of $18,161.84; the total sales and use tax owed was $234,352.08, plus interest and penalty.

suant to sections 283 and 1134 of the Tax Law or to require their compliance with the record keeping and filing provisions of Articles 12-A and 28 of the Tax Law as those provisions relate to the respondents' business.

By Order to Show Cause signed by New York Supreme Court Justice George L. Cobb on November 27, 1985, the respondents moved for a preliminary injunction seeking to enjoin the enforcement as against them of the provisions of Articles 12-A and 28 of the Tax Law. The motion was made returnable before Supreme Court Justice Lawrence E. Kahn on December 6, 1985. Justice Kahn, citing to *Central Machinery Co. v Arizona Tax Commission,* 448 US 160 (1980), ruled that the eventual success of the respondents on the merits was "manifest", and granted a preliminary injunction as requested (A23-A26). The State appealed.

In reversing, the Appellate Division concluded that the respondents had not demonstrated a clear likelihood of success on the merits, a prerequisite for a preliminary injunction, because the challenged provisions of the Tax Law did not impose taxes upon either the respondents or the Indian retailers, but merely imposed upon those entities the "minimal burden" of collecting the taxes from the non-Indian consumer. Based upon the authority of *Moe v Confederated Salish and Kootenai Tribes,* 425 US 463 (1976), and *California State Bd. of Equalization v Chemehuevi Indian Tribe,* 474 US 9 (1985), the Appellate Division concluded that such a tax scheme was permissible (A15-A17). Two justices dissented upon the ground, among others, that federal law pre-empted the application of state law to the trade relationship between reservation Indians and their suppliers (A19-A22). On appeal by permission, the Court of Appeals reversed.

The Court of Appeals held that the respondents were Indian traders within the meaning of the Indian trader statutes, 25 USC § 261, *et seq.*, and that as such the challenged provisions of law were impermissible as applied to them. The Court stated in relevant part (A14):

> "We determine that Congress has preempted the field of regulating trade with Indians on reservations and has left 'no room' for the application of supplementary state tax laws, such as the one here at issue, that impose 'additional burdens' on Indian traders (*see, Warren Trading Post Co. v Arizona Tax Com.*, 380 US 685, 690, *supra*). Thus, no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is pre-empted by the federal trader laws and the Appellate Division erred, as a matter of law, in holding that plaintiffs had not established, a 'clear likelihood of success on the merits' on their application for a preliminary injunction."

Although the Court of Appeals' decision dealt only with the propriety of Special Term's grant of a preliminary injunction, and the case was remitted to the Appellate Division for further proceedings, the Court of Appeals' order sufficiently meets the finality requirements of 28 USC § 1257 to permit review by this Court. This is so because the Court of Appeals' holding with respect to the federal issue is conclusive and the outcome of further proceedings is consequently preordained. Hence, the order of the Court of Appeals is sufficiently final to permit review. *See Cox Broadcasting Corp. v Cohn*, 420 US 478 (1975).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in direct conflict with the decisions of this Court approving "pass on and collect" tax schemes and raises significant issues concerning the rights of states to prevent the avoidance of tax by non-Indian purchasers of goods from Indian retailers.

Notwithstanding the approbation with which this Court has viewed "pass on and collect" tax schemes from the States of Montana and Washington, which are virtually identical to that which is at issue here, the New York Court of Appeals ruled that the Indian trader statutes, 25 USC § 261 *et seq.*, are completely pre-emptive and thus act to prohibit application of the challenged provisions of the New York tax law to respondents' dealings with the Seneca Nation. This result is in direct conflict with the holdings of this Court in *Moe v Confederated Salish and Kootenai Tribes,* 425 US 436 (1976), and *Washington v Confederated Tribes,* 447 US 134 (1980). Because the issue of whether states may employ Indian traders as one link in the chain of a "pass on and collect" tax scheme is of vital importance to those states in which Indian reservations are located, certiorari should be granted to correct the Court of Appeals' erroneous ruling.

In *Moe,* this Court upheld the right of the State of Montana to require Indian tribal sellers of cigarettes to collect a state sales tax imposed upon non-Indian purchasers of cigarettes. The tax scheme, which in this respect is exactly paralleled by that of New York, was described by the three-judge panel which first decided the case as follows, *Confederated Salish and Kootenai Tribes v Moe,* 392 F Supp 1297, 1308 (Dist of Montana, 1975):

> "By express statutory provision the taxes are 'conclusively presumed to be direct taxes on the

> retail consumer *precollected* for the purpose of convenience and facility only'. Section 84-5606(1), R.C.M. 1947. When the tax is paid by the seller it is 'considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user'. *Id.* In other words, *the seller pays the tax to the wholesaler and adds it to the purchase price of the cigarettes.*'' (Emphasis supplied.)

In approving the Montana law, this Court emphasized the fact that the cigarette tax had been validly imposed and observed that without the expedient of having the retailer collect the tax from the non-Indian purchasers ''wholesale violations of the law by the latter class will go virtually unchecked'', 425 US at 483. The Court distinguished *Warren Trading Post Co. v Arizona Tax Comm'n,* 380 US 685 (1965), on the ground that the tax in that case, a gross income tax imposed on the on-reservation sales by a trader to reservation Indians, had been imposed directly on the seller, and would therefore have put additional financial burdens on the trader or the Indians with whom it dealt. 380 US at 691. This, the Court held, ''would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations''. *Id.* In contrast, the collection requirement of the Montana law was characterized by the Court as ''a minimal burden designed to avoid a likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax''. 425 US at 483. The quoted language, from *Warren Trading Post Co.,* was held not to apply. 425 US at 482.

In *Confederated Tribes,* the Court went even further, upholding a Washington State tax scheme which compelled the operators of tribal smokeshops to collect taxes

with respect to the sale of cigarettes to non-Indians and to keep detailed records of both taxable and nontaxable transactions. Significantly, although the lower court's opinion in *Confederated Tribes* makes clear that the operators of the tribal smokeshops were federally licensed Indian traders, *see, Confederated Tribes of Colville v State of Washington,* 446 F Supp 1339, 1347 (ED Wash 1978), this Court rejected out-of-hand the argument that federal Indian law, including the Indian trader statutes, pre-empted the Washington State tax scheme. The Court said, 447 US at 155:

> "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

Of perhaps even greater significance is the further holding of the Court that the State of Washington had the power to seize shipments of unstamped cigarettes traveling to the reservations from out-of-state wholesalers even though the sales by the wholesalers to the tribal businesses were concededly exempt from state taxation and no state tax was due while the cigarettes were in transit. 447 US at 161-162. This holding is in sharp contrast to the conclusion of the Court of Appeals below that the Indian trader laws in and of themselves place every transaction between an Indian tribe and its supplier beyond the regulatory authority of the states.

The Court of Appeals relied primarily upon *Central Machinery Co. v Arizona Tax Comm'n,* 448 US 160 (1980), and *Warren Trading Post Co. v Arizona Tax Comm'n,* 380 US 685 (1965), for its conclusion that federal law has pre-empted New York oversight or action against the respondents with respect to their sales of motor

fuel to the Seneca Nation. However, the nature of the tax schemes in *Central Machinery Co.* and *Warren Trading Post Co.* are wholly distinct from that of New York and these distinctions render the holdings in those cases inapposite.

In *Central Machinery Co.,* this Court ruled that the State of Arizona could not impose a tax against the seller of goods when the sale was made to a tribal enterprise on an Indian reservation. The tax in that case was a "transaction privilege tax" on the privilege of doing business in the State of Arizona. 448 US at 161-162. The amount of the tax was added as a separate item to the price of the goods sold, and was actually borne by the tribal enterprise. The Court ruled that its decision in *Warren Trading Post Co.* was controlling and held that the Indian trader statutes, 25 USC §§ 261-264, a fundamental purpose of which was "to protect Indians against prices deemed unfair or unreasonable by the Indian Commission", 448 US at 164, n. 3 quoting from *Warren Trading Post Co.,* 380 US at 691, pre-empted the asserted state tax. As we discussed above, the tax in *Warren Trading Post Co.* was also imposed against the seller and could thus have put an additional financial burden on the Indians with whom it dealt.

But the New York law, quite unlike the laws found to be improper in *Central Machinery Co.* and *Warren Trading Post Co.,* does not impose taxes upon either the distributor or the tribal enterprise. The taxes are assessed only against non-members of the tribe. As this Court made clear in *Moe* and *Confederated Tribes,* states have a legitimate governmental interest in the collection of those taxes and may employ the aid of Indian traders in doing so. The minimal burdens of prepayment and adequate record keeping required by the New York law, burdens which are reasonably designed to prevent the marketing of the Seneca's tax exemption to non-members of the tribe, are therefore proper.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
September 2, 1987

Respectfully submitted,

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APPENDIX A—Opinion of Court of Appeals, State of New York.

Remittitur

COURT OF APPEALS,

STATE OF NEW YORK.

The Hon. Sol Wachtler, Chief Judge, Presiding

3 No. 109

HERZOG BROTHERS TRUCKING, INC., &c., *et al.*,

Appellants,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondents.

The appellants in the above entitled appeal appeared by Kavinoky and Cook, Esqs.; the respondents appeared by Hon. Robert Abrams, Attorney General of the State of New York.

The Court, after due deliberation, orders and adjudges that the order reversed, with costs, and case remitted to the Appellate Division, Third Department, for further

proceedings in accordance with the opinion herein. Certified question answered in the affirmative. Opinion by Judge Simons. Chief Judge Wachtler and Judges Kaye, Alexander, Titone, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Appellate Division, Third Department there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 7, 1987

Opinion.

COURT OF APPEALS,

STATE OF NEW YORK.

3 No. 109

HERZOG BROTHERS TRUCKING, INC., &c., *et al.*,

Appellants,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, *et al.*,

Respondents.

(109) Joseph E. Zdarsky, Buffalo, for appellant.

Robert Abrams, Attorney General (Lew A. Millenbach, O. Peter Sherwood, & Peter H. Schiff of counsel) for respondent.

SIMONS, J.:

In this action for a declaratory judgment concerning the power of the State Tax Commission to impose a tax on an out-of-state plaintiff's wholesale distribution of motor fuel to Seneca Indian retailers on the Allegany and Cattaraugus Reservations, plaintiffs appeal pursuant to permission granted by the Appellate Division on the certified

question: "Did this court err as a matter of law in reversing the order of Special Term and denying plaintiffs' motion for a preliminary injunction?" We hold that the Appellate Division's determination of the motion for a preliminary injunction was erroneous and, consequently, we reverse the order below and remit the matter to the Appellate Division for further proceedings.

I

The underlying facts are not in dispute. Plaintiffs, Herzog Brothers Trucking, Inc. and its corporate principals, allege in their complaint that Herzog is a Pennsylvania corporation engaged in wholesale and retail distribution and sales of motor fuels. In June 1984, Herzog began wholesale distribution of motor fuel to the Seneca Nation of Indians on its Allegany and Cattaraugus reservations in New York, selling the motor fuel to authorized Indian retail establishments on these reservations. Such sales constituted Herzog's only transactions in motor fuel in this state. Prior to June 1, 1985, sales tax on motor fuel was to be collected at the time the fuel was sold to the ultimate consumer, and a motor fuel tax was to be collected upon the first sale by the distributor (*see*, Tax Law, former arts. 12-A, 28). Believing themselves exempt from state regulation and taxation of motor fuel purchases, the Seneca Indian retailers refused to pay Herzog any state taxes on these transactions. Nevertheless, in October 1984, the State Tax Commission began assessing motor fuel taxes against the corporation.

On June 1, 1985, in order to prevent the continued circumvention of the sales tax on motor fuel, the Legislature amended article 28 of the Tax Law to impose the sales tax at the time that the motor fuel is imported or first sold (*see*, L 1985, ch 44, § 20, adding Tax Law § 1102). Thus, at the present time, articles 12-A and 28 of the Tax Law im-

pose motor fuel and sales taxes upon the importation and sale of motor fuel within the state (*see*, Tax Law §§ 284, 284-a, 284-c, 1101[b][4][ii], 1102, 1105). The taxes are assessed to, and collected from, the distributor and then included in its wholesale price (*see*, Tax Law § 282[1]). Following purchase from the distributor, the retailer includes the tax in its retail price and passes it on to the ultimate consumer. Where the ultimate consumer is an Indian, or otherwise exempt from taxation, the taxes are refunded, or a credit is given (*see*, Tax Law §§ 289-c, 1139).

Plaintiffs brought this declaratory judgment action in November 1985 seeking a declaration that the State of New York is without power to impose the motor fuel taxes and sales taxes on Herzog's sales to Indians on Indian reservations; that the Tax Law, both prior and subsequent to the 1985 amendment, does not expressly apply to its sales of motor fuel to Indians on Indian reservations and that, insofar as the Tax Law purports to impose these taxes on such sales, it is unconstitutional; that the State of New York is without power to regulate or interfere with sales of motor fuel by Herzog to Indians on Indian reservations and, to the extent state requirements concerning registration, recordkeeping, filing of returns and claiming of refunds apply to such sales, the requirements are unconstitutional. Thereafter, by motion for an order to show cause, plaintiffs moved for a preliminary injunction enjoining and restraining the State of New York from determining, collecting or attempting to collect any motor fuel taxes and sales taxes on the sales of motor fuel by Herzog to Indians on Indian reservations and from otherwise interfering or regulating such sales. Special Term granted plaintiffs' motion for a preliminary injunction, reasoning that "[t]he eventual success of plaintiffs on the merits of their application is manifest." On appeal, the Appellate Division reversed the order on the law and denied the mo-

tion for a preliminary injunction. The court found that plaintiffs failed to establish the requisite clear likelihood of success on the merits, because the challenged provisions of the Tax Law merely imposed a " 'minimal burden' of collecting the taxes from a non-Indian consumer on an Indian tribe or retailer as long as the legal incidence of the taxes falls on non-Indian purchasers." The Appellate Division, therefore, held that the imposition of motor fuel and sales taxes on Herzog's motor fuel transactions with the Seneca Nation was "fair, impartial and permissibly constitutional." Two justices dissented from the Appellate Division order of reversal on the ground that federal law pre-empts and prohibits the imposition of taxes by a state when the burden of such taxes are borne by reservation Indians, or when the tax is applied to the trade relationship between reservation Indians and their suppliers.

II

In general, the determination of an application for a provisional remedy is addressed to the discretion of the lower courts and—absent a question of power to exercise discretion, or abuse in the exercise of discretion, in determining the application—is beyond this court's review (*see, Brady v Ottaway Newspapers,* 68 NY2d 1031). When, however, the Appellate Division denies discretionary relief on an issue of law alone, and makes clear that no question of fact or discretion entered into its decision, that question of law is considered decisive of the correctness of the determination and this court has jurisdiction to review it on a properly certified question from the Appellate Division (*see,* Cohen and Karger, Powers of the New York Court of Appeals, § 88, p 377 [1952 ed.]; *Public Administrator of County of N.Y. v Royal Bank of Canada,* 19 NY2d 127, 129-130). The only issue before us on this appeal by certified question is whether, on the motion for

a preliminary injunction, plaintiffs failed to establish, as a matter of law, the requisite clear likelihood of success on the merits of their challenge to the Tax Commission's imposition of taxes on their motor fuel transactions with the Seneca Nation of Indians residing on the Allegany and Cattaraugus Reservations.

III

Plaintiffs contend that New York may not constitutionally tax their wholesale sales of motor fuel to Indian retailers on Indian reservations because the state is precluded from doing so "by the United States Constitution and the laws of the United States enacted pursuant thereto" (Tax Law § 284 [1] and 1102). They argue that the federal Indian trader statutes (25 USC §§ 261-264), enacted pursuant to Article 1, section 8, clause 3 of the United States Constitution,[1] vest the Commissioner of Indian Affairs with the sole power and authority to regulate trade with Indians. They contend that, by virtue of such legislation and supporting regulations, federal law has totally preempted the regulation of sales made to Indians on Indian reservations, including state taxation of Indian trade (citing *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 US 160). Plaintiffs further maintain that, although Indian vendors in a chain of distribution might be required to collect a tax from a non-Indian retail customer, the Indian vendors cannot be required to pay a state tax to their suppliers in connection with their wholesale purchases (relying on *California State Bd. of Equalization v Chemehuevi Indian Tribe,* ____ US ____, 106 S Ct 289, *reh den* ____ US ____, 106 S Ct 839; *Washington v Confederated Tribes of Colville Indian*

[1]Article 1, section 8, clause 3 of the Constitution grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Reservation, 447 US 134, *reh den* 448 US 911; *Moe v Confederated Salish and Kootenai Tribes,* 425 US 463).

Defendants counter that the tax scheme here challenged neither imposes a tax upon plaintiffs or the Seneca Nation of Indians, nor places an impermissible burden upon a transaction between them. The Tax Law merely requires that Herzog and the Indian retailers keep adequate records of their sales, and imposes upon them a minimal burden of precollecting the taxes due from the non-Indian consumer. Where the ultimate sales are made to Indians, the state refunds that portion of the tax prepaid by the retailer and distributor. Defendants maintain that the motor fuel tax scheme is proper and constitutional, for federal law has not pre-empted the State of New York from exercising its authority to compel the assistance of distributors and retailers in *collecting* taxes owed by non-Indian consumers (relying on *Washington v Confederated Tribes of Colville Indian Reservation, supra*). Rather, the Supreme Court has upheld state tax schemes that require prepayment of state taxes by Indian vendors (citing *Moe v Confederated Salish and Kootenai Tribes, supra; Washington v Confederated Tribes of Colville Indian Reservation, supra*). Defendants contend that as long as the actual burden, as well as the legal incidence, of the motor fuel taxes falls on the non-Indian consumer—which it does here—the taxing scheme is constitutional.

The Supremacy Clause of the United States Constitution[2] invalidates state laws that "interfere with, or are con-

[2]The Supremacy Clause of the United States Constitution contained in Article 1, section VI, clause 2, provides:

> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

trary to" federal law (*see, Hillsborough County, Fla. v Auto. Med. Labs.*, ____ US ____, 105 S Ct 2371, 2375 [*quoting Gibbons v Ogden*, 9 Wheat 1, 211]). The operation of the Supremacy Clause is not dependent on an express Congressional statement of pre-emption. Rather, "Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation" (*id.* [citing *Rice v Santa Fe Elevator Corp*, 331 US 218, 230]; *see also*, Tribe, American Constitutional Law, § 6-25, p 384). Pre-emption of a whole field of regulation is likewise inferred where federal interest in that field "is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" (*Hillsborough County, Fla. v Auto. Med. Labs, supra*, p 2375 [*quoting Rice v Santa Fe Elevator Corp, supra*).

As a leading treatise on Indian law indicates: "Indian affairs occupy a unique place in Supremacy Clause law and theory" (Cohen, Handbook of Federal Indian Law, p 272 [1982 ed.]; *see generally, id.* at 270-279). This is apparent from the fact that the Supreme Court has relied almost exclusively on prior legislative and judicial precedent involving Indian matters, without relying on Supremacy Clause precedents in other fields, in determining the scope of the pre-emption doctrine in Indian cases (*id.* at 272-273). Inasmuch as the Constitution vests the federal government with exclusive authority over relations with Indian tribes, Congress has plenary and pre-emptive power in all matters concerning the Indians, subject to the Bill of Rights and other constitutional considerations (*see, Montana v Blackfeet Tribe of Indians*, 471 US ____, 105 S Ct 2399, 2402 [construing US Const, art 1, § 8, cl 3]); *and see*, Tribe, American Constitutional Law, § 16-14, p 1018, *supra*).

In general, Indian tribes and individuals are exempt from state taxation within their own territory. Congress may authorize the imposition of state taxes upon them if it so chooses, but it has never done so as a general matter and the Supreme Court has refused to uphold state taxation of Indians absent an "unmistakably clear" expression of Congressional intent to authorize the particular tax (*see, Montana v Blackfeet Tribe of Indians, supra,* pp 2402-2403; *see, generally,* Cohen, Handbook of Federal Indian Law, *supra,* pp 407-412; Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians,* 40 Law & Contemp Probs 166, 183 [1976]). States may validly impose a non-discriminatory tax on the non-Indian customers of Indian retailers doing business on reservations, however, even if the tax seriously disadvantages or eliminates the Indian retailer's business with non-Indians (*Washington v Confederated Tribes of Colville Indian Reservation,* 447 US 134, 151, *supra* [discussing the principles set forth in *Moe v Confederated Salish and Kootenai Tribes,* 425 US 463, *supra*]). If the incidence of the tax falls on non-Indians, the state's action in imposing the tax is permissible because it does not interfere with any supervening federal law and does not violate the proscription against direct taxation of Indians without clear Congressional consent (*see, Moe v Confederated Salish and Kootenai Tribes, supra,* p 483 [construing *Mescalero Apache Tribe v Jones,* 411 US 145, 148]). Thus, the Supreme Court has approved state taxation schemes requiring Indian retailers on reservations to collect the tax imposed on the non-Indian customer, reasoning that such a requirement "Is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax" (*Moe v Confederated Salish and Kootenai Tribes, supra,* p 483; *see also, California State Bd. of Equalization v Chemehuevi Indian Tribe,* 106 S Ct 289, *supra*). The

same rationale has been applied to state taxation schemes that require Indian retailers on reservations to keep detailed records of all exempt and non-exempt sales of taxable items (*see, Washington v Confederated Tribes of Colville Indian Reservation,* 447 US 134, 160, *supra*). Defendants contend that the present statutes are lawful because they do no more than what these Supreme Court decisions permit. The Appellate Division agreed with this reasoning but we are persuaded otherwise.

Concededly the tax assessed here must ultimately be paid by non-Indians, but that is not the end of the inquiry. When a state tax is imposed upon, or otherwise burdens, a transaction between a non-Indian customer and an Indian individual or tribe, and the legal incidence of the tax is determined to properly fall on the non-Indian party, the Supreme Court has nonetheless "examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence" to determine whether the method of collecting the state tax is constitutional (Cohen, Handbook of Federal Indian Law, *supra,* p 413 [quoting *White Mountain Apache Tribe v Bracker,* 448 US 136]). Where, as here, the taxation scheme imposes obligations on a wholesale trader to Indian retailers on Indian reservations, a different result follows than that urged by defendants, and adopted by the Appellate Division, because federal law pre-empts and invalidates the state action (*see generally, id.* at 413-414).

The Supreme Court has drawn a clear distinction between state taxation schemes which merely require Indian retailers to collect a valid tax on non-Indian purchasers and those that burden persons engaged in trade with Indians on reservations (*see, Washington v Confederated Tribes of Colville Indian Reservation,* 447 US 134, 155, *supra; Moe v Confederated Salish and Kootenai Tribes,*

425 US 463, 482-483, *supra*). A dispositive factor recognized by the court in drawing such a distinction is the clearly manifested intent of Congress in enacting the trader laws to foster tribal self-government and economic development by enactment of the trader statutes (*see, Washington v Confederated Tribes of Colville Indian Reservation, supra,* p 155 [construing 25 USC §§ 261 *et seq.*). No similar intent is implicated in sales by reservation Indians to non-Indians (*Id.* at 155-156). Thus, since there is no dispute that plaintiff Herzog is a "trader" within the meaning of the federal Indian trader laws,[3] we must consider the Indian trader statutes, and the cases construing them, to determine if federal law pre-empts the state tax at issue.[4]

Ever since Congress passed a statute in 1790 regulating the licensing of Indian traders, the federal government has "comprehensively regulated trade with Indians to prevent 'fraud and imposition' upon them" (*Central Machinery*

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[3]25 USC § 261 provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

The Supreme Court has construed the term "trader" to apply to any person introducing goods, or trading, in Indian country or on an Indian reservation (*see, Central Machinery Co. v. Arizona State Tax Com.*, 448 US 160, 164-165 [relying on 25 USC § 264]).

[4]A 1906 opinion by this court holds that, because of the unique history of the Seneca Nation of Indians in this state, New York has exclusive sovereignty and jurisdiction over these Indians, and the Indian trader statutes are not applicable to their affairs (*see, Jemison v Bell Telephone Co. of Buffalo,* 186 NY 493). Although *Jemison* has never been explicitly overruled, its holding has been implicitly rejected by subsequent decisions of this court and of the Supreme Court (*see, e.g., Warren Trading Post Co. v. Arizona Tax Com.*, 380 US 685; *People ex rel. Cusick v. Daly,* 212 NY 183, 196-197).

Co. v. Arizona State Tax Com., 448 US 160, 163, *supra* [discussing Act of July 22, 1790, ch 33, 1 Stat 137]). The present laws, known collectively as the Indian trader statutes, similarly "incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange" (*Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134, 155, *supra*). In *Warren Trading Post Co. v Arizona Tax Com.*, which involved a retail trader's challenge to a state tax on gross proceeds or income from sales imposed on its trade with Indians on the Navaho Reservation, the Supreme Court emphasized that the federal government has exercised "a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes" (*Warren Trading Post Co. v. Arizona Tax Com.*, 380 US 685, 687-688). In construing the federal Indian trader laws, and the implementing regulations, the court observed that "[t]hese apparently all-inclusive regulations and the statutes authorizing them would seem themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders" (*id* at 690 [footnote omitted]).

Later, in the *Central Machinery Co.* case involving an Arizona "transaction privilege" tax assessed against the seller of tractors to an enterprise of the Gila River Indian Tribe, the Supreme Court reaffirmed that the mere *existence* of the Indian trader laws pre-empted the field of transactions with reservation Indians, even where the seller was an unlicensed trader with no permanent place of business on the Indian reservation (*see, Central Machinery Co v Arizona State Tax Com.*, 448 US 160, 165, *supra*). The court noted that "[i]t may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until

Congress repeals or amends the Indian trader statutes, however, we must give them 'a sweep as broad as their language' . . . and interpret them in light of the intent of the Congress that enacted them' (*id.* at 166 [citations omitted]).

The Supreme Court cases construing the Indian trader statutes are dispositive. We determine that Congress has preempted the field of regulating trade with Indians on reservations and has left "no room" for the application of supplementary state tax laws, such as the one here at issue, that impose "additional burdens" on Indian traders (*see, Warren Trading Post Co. v. Arizona Tax Com.*, 380 US 685, 690, *supra*). Thus, no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is preempted by the federal trader laws and the Appellate Division erred, as a matter of law, in holding that plaintiffs had not established a "clear likelihood of success on the merits" on their application for a preliminary injunction.

Accordingly, the certified question should be answered in the affirmative, the order of the Appellate Division reversed and the matter remitted to that court for a consideration of undetermined questions (*see, Public Administrator of County of N.Y. v Royal Bank of Canada*, 19 NY2d 127, 129-130, *supra*).

* * * * * * * * * * * * * * * * * *

Order reversed, with costs and case remitted to the Appellate Division, Third Department, for further proceedings in accordance with the opinion herein. Certified question answered in the affirmative. Opinion by Judge Simons. Chief Judge Wachtler and Judges Kaye, Alexander, Titone, Hancock and Bellacosa concur.

Decided May 7, 1987

APPENDIX B—Opinion of the Appellate Division—Third Department.

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

July 31, 1986 52150

HERZOG BROTHERS TRUCKING, INC., Also Known as Herzog Brothers, Inc., *et al.*,

Respondents,

v

STATE TAX COMMISSION OF THE STATE OF NEW YORK *et al.*,

Appellants.

CASEY, J.:

Appeal from an order of the Supreme Court at Special Term (Kahn, J.), entered March 3, 1986 in Albany County, which granted plaintiffs' motion for a preliminary injunction.

Plaintiff Herzog Brothers Trucking, Inc. (Herzog) is a Pennsylvania corporation engaged in the wholesale and retail distribution and sale of motor fuels. In June 1984, wholesale distribution of motor fuels was made to the

Seneca Nation of Indians on the Allegany and Cattaraugus Reservations, and sales were made to authorized retail establishments located on the reservations. These distributions and sales are the only ones made by Herzog in this State.

Prior to June 1, 1985, sales taxes were collected at the time motor fuels were sold to the ultimate consumer and the motor fuel tax was collected upon the first sale by the distributor (*see*, Tax Law former arts 12-A, 28). However, the Indian retailers claiming exemption from State taxation refused to pay the motor fuel tax (Tax Law art 12-A) or sales tax (Tax Law art 28). Because non-Indians were driving to the reservations and purchasing motor fuels and avoiding the payment of taxes, a statutory amendment was enacted on June 1, 1985 (L 1985, ch 44, § 20, adding Tax Law § 1102). In order to deter this tax evasion, the amendment imposed taxes at the time the fuel is imported or first sold (Tax Law § 1102 [a] [i], [ii]). As amended, the pertinent provisions of the Tax Law provide that an excise tax (Tax Law § 284 [1]) and a sales tax (Tax Law § 1102 [a]), except as prohibited by the US Constitution and the laws of the United States enacted pursuant thereto, are imposed on the importation of motor fuels by a distributor of such fuels. Both the motor fuel and sales taxes are then passed through to the retailer and are ultimately to be borne by the retail consumer (*see*, Tax Law § 289-c [1], [2]; § 1102 [d]; § 1132 [a]; § 1133 [a]). All such fuel imported or sold in this State is presumed to be subject to the motor fuel tax (Tax Law § 285-a). If the distributor fails to collect the tax, the purchaser of the fuel is required to remit the tax (Tax Law § 284 [3]; § 1102 [b]). Every person who imports or sells motor fuel is also required to register (Tax Law § 283 [1]; § 1134), keep detailed records of his sales (Tax Law §§ 287, 1136) and post bonds or deposit securities "to secure the payment of any sums due from such distributor" (Tax Law § 283 [3]). The bonding re-

quirement appears to apply only to the distributors of motor fuel, while the other requirements apply to both distributors and retailers of motor fuels. The Tax Law further provides for a refund or credit for any tax which is collected from or paid by a person or entity which is exempt from such taxation (*see*, Tax Law §§ 289-c, 1139). The assessment in this case against Herzog is for past sales covering the period from June 1, 1984 to May 31, 1985.

In October 1984, defendants began assessing motor fuel tax and sales tax against Herzog with regard to the past sales. These assessments approximated $480,000, exclusive of penalties and interest. Herzog filed petitions challenging this assessment, claiming exemption because all their sales were to Indians or Indian reservations. In November 1985, while administrative proceedings were still pending, the instant declaratory judgment action was commenced by Herzog and its shareholders seeking a declaration of unconstitutionality of the taxes and the procedures employed to collect them. Subsequently, plaintiffs moved for a preliminary injunction to restrain defendants from taking any action in regard to imposing or collecting the taxes. Special Term granted the preliminary injunction and fixed an undertaking of $250. This appeal by defendants followed.

To obtain a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury if the relief is not granted, and (3) a balancing of the equities in his favor (*Clark v. Cuomo*, 103 AD2d 244, 245). When the injunction is sought to restrain the enforcement of a tax, it should be granted only in the most unusual cases (*Grant Co. v Srogi*, 52 NY2d 496, 517). In their application, plaintiffs have not demonstrated their clear entitlement to the relief that they seek.

Facially, the pertinent statutory provisions do not appear unconstitutional. Although Federal law prohibits the imposition of State taxes on Indians who are members of a

reservation (*Central Mach. Co. v. Arizona State Tax Commn.*, 448 US 160), a State may impose non-discriminatory taxes on non-Indian customers of Indian retailers who do business on the reservations (*Moe v. Confederated Salish and Kootenai Tribes*, 425 US 463; *see, California State Bd. of Equalization v. Chemehuevi Indian Tribe*, ____ US ____, 106 S Ct 289) and may further impose the "minimal burden" of collecting the taxes from a non-Indian consumer on an Indian tribe or retailer as long as the legal incidence of the taxes falls on non-Indian purchasers (*Moe v. Confederated Salish and Kootenai Tribes, supra*, p 483). This is precisely what the above statutory provisions require and allow. By their wording, the statutes appear to apply with an even hand in a fair, impartial and permissibly constitutional manner sufficient to meet the attack made by plaintiffs herein.

The critical question, of course, and the one which divides this court, is whether the burden of total prepayment intitially imposed on Herzog as the distributor, which is subject ultimately to a refund or credit if the sales have been made to exempt entities or persons, imposes a burden on plaintiffs that exceeds the permissible "minimal burden of collection" standard. In our opinion, plaintiffs' application for a preliminary injunction does not demonstrate any such excess. Plaintiffs have, therefore, failed to establish the clear likelihood of success on the merits required for a showing of their entitlement to a preliminary injunction. Accordingly, their application for such injunction should be denied and the order of Special Term reversed.

Order reversed, on the law, without costs, and motion denied.

Mahoney, P.J. Casey and Levine, JJ., concur; Kane and Mikoll, JJ., dissent and vote to affirm in a memorandum by Mikoll, J.

MIKOLL, J. (dissenting):

We respectfully dissent.

The issue to be decided on this appeal is whether Special Term properly granted plaintiffs' motion for a preliminary injunction. "In order to be entitled to a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury to him if the relief is not granted, and (3) a balancing of the equities in his favor" (*Clark v Cuomo*, 103 AD2d 244, 245). Appellate review is "limited to determining whether Special Term erred in finding that plaintiff had satisfactorily met his burden as to all three of the criteria delineated above which would entitle him to a preliminary injunction" (*id.*, at 245-246). While issuance of a preliminary injunction to restrain the enforcement of a tax is permissible, it should only be exercised in the most unusual circumstances (*Grant Co. v Srogi*, 52 NY2d 496, 517).

In the case at bar, there should be an affirmance. Special Term did not abuse its discretion in finding that plaintiffs demonstrated the likelihood of their success on the merits, irreparable injury if relief were not granted and the equities balanced in their favor. The required unusual circumstances exist in this case (*see, Grant Co. v Srogi, supra*).

Plaintiff Herzog Brothers Trucking, Inc. (Herzog) began making distributions of motor fuels to members of the Seneca Nation of Indians on the Allegany and Cattaraugus Reservations in June 1984. The sales were made to retail establishments located on the reservations which were authorized to purchase motor fuels on behalf of the Seneca Nation of Indians. Herzog's only sales in this State were to these Indians. The Indian retailers claimed that they were exempt from State taxation and refused to pay any motor fuel tax (Tax Law art 12-A) or sales tax (Tax

Law art 28). Thus, neither tax was collected as to any of the sales.

Defendants contend that they can constitutionally subject plaintiffs and the Indian retailers to the burden of acting as their "agents" to assist in collecting the taxes in dispute and can require them to comply with the Tax Law's administrative provisions. We disagree.

Federal law preempts, and thus prohibits, the imposition of taxes by a state when the burden of such taxes is borne by Indians who are members of the reservation involved (*see, Central Mach. Co. v Arizona State Tax Commn.*, 448 US 160; *Warren Trading Post v Arizona State Tax Commn.*, 380 US 685, 691-692). However, a state may impose nondiscriminatory taxes on non-Indian customers of Indian retailers who conduct their business on the reservation (*see, Moe v Confederated Salish and Kootenai Tribes*, 425 US 463; *see also, California State Bd. of Equalization v Chemhuevi Indian Tribe*, ___ US ___, 106 S Ct 289; *Washington v Confederated Tribes of Colveille Indian Reservation*, 447 US 134). As long as the legal incidence of the taxes falls only on the non-Indian purchaser, a state may even impose on an Indian tribe or Indian retailer the *minimal burden* of collecting the taxes from the non-Indian consumer (*Moe v Confederated Salish and Kootenai Tribes, supra*, pp 482-483; *see, California State Bd. of Equalization v Chemehuevi Indian Tribe, supra*). In the case at bar, however, the burden imposed on the Indians appears to be more than the minimal burden approved by the Supreme Court in the above-referenced cases. The Indian retailers are required to prepay the entire amount of these taxes even though the majority of their sales are presumably tax free. In effect, an Indian retailer is required to prepay a tax on a transaction in which no tax is imposed. Since no tax is or would ever be due on the sale of motor fuel to Indians, the Indian retailer is being deprived of his money for a period of time

until he can prove it should be returned to him under this scheme. It clearly appears, therefore, that the cases relied on by defendants to justify this taxing scheme are distinguishable and inapplicable to the situation in this case. The tax on sales to Indians is preempted and thus prohibited. The taxing scheme therefore effectively requires plaintiffs to prepay a prohibited tax. This requirement on plaintiffs is also destructive of the trade relationship between Indians and their suppliers and is thus an unauthorized interference in Indian trading, an area preempted by Federal law (*see, Central Mach. Co. v Arizona State Tax Commn., supra*).

Furthermore, Special Term's finding that plaintiffs established that they would suffer irreparable injury absent injunctive relief was proper. Plaintiffs assert that the Indian accounts constituted approximately 50% of their business and about $7,000 in sales per week. They assert that without such revenue, equipment purchased and financed to service those accounts would be lost. That loss to plaintiffs appears to be commercially life threatening, thus warranting the grant of a preliminary injunction (*see, Stanley-Fizer Assoc. v Sport-Billy Prods. Rolf Dehyle*, 608 F Supp 1033, 1035). It is also possible that further criminal sanctions may be imposed on plaintiffs after November 1, 1985. Accordingly, Special Term did not abuse its discretion when it found irreparable injury to plaintiffs.

Nor did Special Term abuse its discretion when it concluded that the equities balanced in plaintiffs' favor. Plaintiffs did not create the problems sought to be remedied by the new taxing scheme. It appears that plaintiffs relied in good faith on the Indian retailers' assurances that they were not required to pay these taxes. Moreover, the sums involved are substantial to plaintiffs but are insubstantial to defendants.

Additionally, we reject defendants' contention that plaintiffs should have exhausted their administrative remedies before pursuing this declaratory judgment action. "[W]hen the taxing authority's jurisdiction is challenged as unconstitutional or as inapplicable" (*Horner v State of New York*, 107 AD2d 64, 65), or when the constitutionality of a statute is challenged (*see*, *Allstate Ins. Co. v Tax Commn. of State of N.Y.*, 115 AD2d 831, 834; *Reader's Digest Assn. v Friedlander*, 100 AD2d 871, 872, *lv denied* 64 NY2d 601), there is no need to exhaust administrative remedies. Special Term's order should be affirmed.

APPENDIX C—Opinion of the Supreme Court, Albany County.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Plaintiffs,

against

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G. W. CHU, as Commissioner of Taxation and Fianance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Defendants.

Supreme Court, Albany County Special Term

December 6, 1985—Calendar No. 38

Justice Lawrence E. Kahn, Presiding

Appearances:

Kavinoky & Cook, Esqs., Attorneys for plaintiffs, 120 Delaware Avenue, Buffalo, New York 14202, (716) 856-9234.

Rowley, Forrest and O'Donnell, Attorneys for plaintiffs (of Counsel), 90 State Street, Albany, New York 12207, 434-6187.

Hon. Robert Abrams, Attorney General, Attorney for defendants, Lawrence L. Doolittle, Esq. (of Counsel), The Capital, Albany, New York 12224, 474-2121 474-2234.

KAHN, J.:

As an adjunct to plaintiffs' action for declaratory and injunctive relief, the court has before it a motion for a preliminary injunction restraining defendants from determining or collecting any motor fuel taxes and sales taxes alleged to be owed by plaintiffs, pursuant to Articles 12-A and 28 of the Tax Law, with respect to motor fuel sold by Herzog Brothers Trucking, Inc., a/k/a Herzog Brothers, Inc., to Seneca Indians on Seneca Indian Reservations. Plaintiffs seek to preliminarily enjoin defendants from invoking any civil or criminal proceedings, or other provisions of the Tax Law with respect to the aforesaid sales. The underlying facts and statutes are well-known to the litigants and shall not be repeated at length herein.

The sole issue before this court is plaintiffs' application for preliminary injunctive relief. It is well-settled that such requests are "granted sparingly and only when the moving party has clearly established: (1) the likelihood of his ultimate success on the merits, (2) an urgent necessity to prevent immediate and irreparable injury, and (3) a balancing of the equities in favor of the granting of such relief . . . And when his request for such relief challenges the constitutionality of presumptively valid and carefully con-

sidered legislation, or administrative regulations of a legislative nature, he assumes the heavier burden of establishing unconstitutionality, and his right to injunctive relief, beyond a reasonable doubt . . . ." (*Galaxy Rental Serv. v State of New York,* 108 Misc 2d 237, 239-240).

The motion shall be granted. The eventual success of plaintiffs on the merits of their application is manifest (*Central Machinery Co. v Arizona Tax Commission,* 448 U.S. 160). While defendants may constitutionally require the Seneca Indian vendors to assist them in collection of taxes imposed upon non-Indian purchasers (*Washington v Confederated Tribes of Colville,* 447 U.S. 134), it may not require prepayment of the motor fuel and sales taxes by such vendors for all wholesale purchases from plaintiffs. "[T]he first taxable event is the use, consumption or possession by the non-Indian purchaser." (*supra,* p 142).

Upon the submissions before the court, plaintiffs have established irreparable injury absent preliminary relief. They have incurred substantial debt through the purchase and lease of equipment to service their Indian accounts in this state. Further, they continue to be exposed to the threat of both criminal and civil enforcement of the challenged statute. "Under the circumstances, plaintiff has sufficiently established a likelihood of ultimate success on the merits, and should not be required to suffer further economic damage during the pendency of an action in which it appears that it will be ultimately successful as a matter of law." (*Social Spirits, Inc. v. Town of Colonie,* 70 AD2d 1036, 1038).

Upon the question of the balancing of the equities of the litigants, it is clear that the recent amendments to the Tax Law are intended to halt the alleged illegal activity by certain Indian vendors who sell gasoline to non-Indians at prices substantially below gas stations off the reservation. Plaintiffs have neither created this problem nor have any control over retail sales after the gasoline has been purchased by the Indian vendors.

Finally, the court notes that this is not litigation where plaintiffs need to exhaust available administrative remedies (*Allstate Ins. Co. v NYS Tax Comm.*, AD2d , December 5, 1985, Appellate Division, Third Department). The doctrine of exhaustion of administrative remedies is not applicable where the constitutionality of the statute is challenged or is claimed to be inapplicable by its own terms (*Slater v Gallman,* 38 NY2d 1).

The motion of plaintiffs for a preliminary injunction shall be granted. The injunction shall issue upon the condition that plaintiffs file an undertaking in the sum of $250 (*Horner v State of New York,* 125 Misc 2d 1, 8; affd 107 AD2d 64). All papers to attorneys for plaintiffs, who shall submit an order in conformance herewith, with a copy of this decision annexed.

Dated: February 25, 1986
Albany, New York

APPENDIX D—Opinion of the Appellate Division—Third Department Following Remittance.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

July 16, 1987 52150

HERZOG BROTHERS TRUCKING, INC., Also Known as Herzog Brothers, Inc., *et al.*,

Respondents,

v

STATE TAX COMMISSION OF THE STATE OF NEW YORK *et al.*,

Appellants.

MIKOLL, J.:

Appeal from an order of the Supreme Court at Special Term (Kahn, J.), entered March 3, 1986 in Albany County, which granted plaintiffs' motion for a preliminary injunction.

When this matter was previously before us, we reversed Special Term's grant of plaintiffs' motion for a preliminary injunction (122 AD2d 518). The matter was appealed on a certified question to the Court of Appeals. Upon finding that Congress had preempted the field of

regulating trade with Indians on reservations and had left " 'no room' for the application of supplementary state tax laws, such as the one here at issue", the Court of Appeals reversed our order and remitted the case to this court for consideration of undetermined questions (69 NY2d 536, 546).

We now affirm Special Term's grant of a preliminary injunction. The Court of Appeals' decision makes it clear that plaintiffs will succeed on the merits. Plaintiffs have also adequately substantiated that they will suffer irreparable injury absent injunctive relief and that the equities otherwise balance in their favor.

Order affirmed, with costs.

Mahoney, P.J., Kane, Casey, Mikoll and Levine, JJ., Concur.

APPENDIX E—Statutory Provisions Involved.

25 USC

"§ 261. Power to appoint traders with Indians

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

"§ 262. Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

"§ 263. Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

"§ 264. Trading without license; white persons as clerks

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior."

New York Tax Law

"§ 282. Definitions

As used in this article, 1. "Distributor" means any person, firm, association or corporation, who or which imports or causes to be imported into the state, for use, distribution, storage or sale within the state, any motor fuel; and also any person, firm, association or corporation who or which produces, refines, manufactures or compounds motor fuel within the state. Motor fuel brought into the state in the ordinary fuel tank connecting with the

engine of a motor vehicle, aeroplane, motor boat or other conveyance propelled by the use of motor fuel, and to be used only in the operation thereof, shall not be deemed imported within the meaning of this article, if not removed from such tank except as used in the propulsion of such engine."

"§ 283. Registration of distributors

1. The department of taxation and finance, upon the application of a person, shall register such person as a distributor under this article except as provided in subdivisions two and five of this section. The application shall be in a form and contain such data as the department of taxation and finance shall prescribe. No person, unless so registered, shall import or cause any motor fuel to be imported into the state, for use, distribution, storage or sale within the state or shall produce, refine, manufacture or compound motor fuel within the state. No distributor, unless so registered, shall make any sale, transfer, use or other disposition of motor fuel within the state, except a sale, transfer, use or other disposition, if any, as to which the state cannot impose such condition by reason of the United States constitution and of laws of the United States enacted pursuant thereto.

* * *

"3. The tax commission shall require a distributor to file with the department of taxation and finance a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in this state or other security accept-

able to the tax commission, in such amount as the tax commission may fix, in an amount determined in accordance with rules and regulations prescribed by it, to secure the payment of any sums due from such distributor (i) pursuant to this article and (ii) pursuant to articles twenty-eight and twenty-nine of this chapter with respect to sales and uses of motor fuel. The tax commission shall require that such a bond or other security be filed before a distributor is registered, and the amount thereof may be increased at any time when in its judgment the same is necessary as a protection to the revenues under this article and articles twenty-eight and twenty-nine of this chapter. If securities are deposited as security under this subdivision, such securities shall be kept in the joint custody of the comptroller and the commissioner of taxation and finance and may be sold by the tax commission if it becomes necessary so to do in order to recover any sums due from such distributor (i) pursuant to this article and (ii) pursuant to articles twenty-eight and twenty-nine of this chapter with respect to sales and uses of motor fuel, but no such sale shall be had until after such distributor shall have had opportunity to litigate the validity of any tax if it elects so to do. Upon any such sale the surplus, if any, above the sums due (i) under this article and (ii) pursuant to articles twenty-eight and twenty-nine of this chapter with respect to sales and uses of motor fuel shall be returned to such distributor. The department, when authorized by the distributor, shall furnish information regarding the distributor's registration and any other information which the distributor authorizes it to disclose.

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"7. Whenever evidence is furnished by the tax commission to any justice of the supreme court in court or at chambers, showing that any person not registered as a distributor as requried by this section has imported motor fuel into this state or caused motor fuel to be imported into this state or has produced, refined, manufactured or compounded motor fuel within this state, such justice shall make a summary order prohibiting such person and his agents from selling such motor fuel or any motor fuel illegally and also prohibiting all other persons from selling or releasing any motor fuel illegally imported or sold by such person until such person shall have registered, reported the importation or sale of such motor fuel illegally imported or sold and paid the tax thereon or until the tax commission consents to such sale."

"§ 284. Tax imposed

1. There is hereby levied and imposed an excise tax of four cents per gallon upon motor fuel (a) imported into or caused to be imported into the state by a distributor for use, distribution, storage or sale in the state or upon motor fuel which is produced, refined, manufactured or compounded by a distributor in the state (which acts shall hereinafter in this subdivision be encompassed by the phrase "imported or manufactured") or (b) if the tax has not been imposed prior to its sale in this state, which is sold by a distributor (which act, in conjunction with the acts described in paragraph (a) of this subdivision, shall hereinafter in this article be encompassed by the phrase "imported, manufactured or sold"), except when imported, manufactured or sold under circumstances which preclude

the collection of such tax by reason of the United States constitution and of laws of the United States enacted pursuant thereto or when imported or manufactured by an organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter or a hospital included in the organizations described in paragraph four of such subdivision for its own use or consumption and except kero-jet fuel when imported or manufactured by an airline for use in its airplanes. Provided, further, no motor fuel shall be included in the measure of the tax unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution. All tax for the period for which a return is required to be filed shall be due on the date limited for the filing of the return for such period, regardless of whether a return is filed by such distributor as required by this article or whether the return which is filed correctly shows the amount of tax due."

"§ 284-a. Additional motor fuel tax

In addition to the tax imposed by section two hundred eighty-four of this chapter, a like tax shall be imposed at the rate of three cents per gallon upon motor fuel imported, manufactured or sold within this state by a distributor. All the provisions of this article shall apply with respect to the additional tax imposed by this section to the same extent as if it were imposed by said section two hundred eighty-four."

"§ 284—c. Supplemental motor fuel tax

In addition to the taxes imposed by sections two hundred eighty-four and two hundred eighty-four-a of this chapter, a like tax shall be imposed at the rate of one cent per gallon upon motor fuel imported, manufactured or sold within this state by a distributor. Except for paragraph (b) of subdivision three of section two hundred eighty-nine-c, all the provisions of this article shall apply with respect to the supplemental tax imposed by this section to the same extent as if it were imposed by said section two hundred eighty-four. On and after the first day of October, nineteen hundred seventy-two, twenty-five per centum of the monies received by the department of taxation and finance pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund established pursuant to the provisions of section eighty-nine of the state finance law. Beginning on April first, nineteen hundred eighty-three, twenty-five per centum of the monies received by the department of taxation and finance pursuant to the provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund established pursuant to the provisions of section eighty-nine-a of the state finance law."

"§ 285-a. Presumption of taxability

1. No person shall purchase motor fuel in this state, excluding a purchase at retail, unless the taxes imposed by this article have been assumed by a distributor registered under this article in accordance with a certification under subdivision three of

this section or paid by such distributor, and, in each of such instances, are passed through to such purchaser. In addition to any other civil and criminal penalties which may apply, any person who purchases motor fuel without having received a certification from the seller in accordance with subdivision three of this section shall be jointly and severally liable to pay the taxes imposed by this article with respect to such motor fuel.

"2. For the purpose of the proper administration of this article and to prevent evasion of the tax on motor fuel imposed by and pursuant to this article, it shall be presumed that all motor fuel imported, manufactured or sold, received or possessed in the state is intended for use, distribution, storage or sale in the state and subject to the taxes imposed by this article until the contrary is established. It shall be further presumed that all motor fuel so imported, manufactured or sold, received or possessed in the state by any person, other than motor fuel delivered into the ordinary fuel tank connected with the engine of a means of conveyance in order to propel it, or in small drums or similar containers, which such person cannot otherwise account for, is subject to the taxes imposed by this article and such person is responsible for payment of such taxes. Provided, however, a distributor of motor fuel who imports, manufactures or sells and stores in the state or who purchases and stores motor fuel in the state on which he has paid the taxes imposed by this article shall be allowed an adjustment in arriving at the gallons subject to the taxes imposed by such section on account of the gallons the distributor establishes were lost due to shrinkage, evaporation and handling; provided,

however, such allowance shall not exceed two percent of the fuel stored. Provided, further, that in arriving at the gallons of motor fuel subject to the taxes imposed by this article, there shall be allowed an adjustment on account of gallons lost or destroyed due to an accident, such as fire, and at the time of such loss or destruction where being held or transported for sale other than at retail. The burden of proving that any motor fuel is not so subject shall be upon the person so responsible for such payment with respect to such fuel.

"3. (a) Upon each sale of motor fuel, other than a sale at retail, the seller must give to the purchaser and the purchaser shall receive at the time of delivery of such motor fuel, a certification containing such information as the tax commission shall require which shall include a statement to the effect: (i) if such seller is a distributor registered under this article, that he assumed the payment of or paid the taxes imposed by this article and, in each case, is passing through such taxes; or (ii) that such seller is passing through such taxes which were so previously assumed or paid by an identified distributor registered under this article, and passed through to him.

"(b) If the certification required by this subdivision has been furnished to the purchaser at delivery and accepted in good faith, the burden of proving that the taxes imposed by this article were assumed or paid by a distributor registered as such under this article and passed through shall be solely on the seller.

"(c) Where the certification required under this paragraph is not furnished by the seller at delivery of motor fuel, it shall be presumed that the taxes imposed by this article have not been assumed or paid by a distributor registered as such under this article and that the purchaser in such case is jointly and severally liable for such taxes.

"(d) If, due to the circumstances of delivery, it is not possible to issue a certification required under this subdivision at the time of delivery of motor fuel, the tax commission may authorize the delivery of the certification required under this paragraph at a time after the delivery of the motor fuel which is the subject of the sale under the limited circumstances it shall prescribe and upon such terms and conditions it shall deem necessary to ensure collection of the taxes imposed by this article and the tax imposed by section eleven hundred two of this chapter."

"§ 286. Records to be kept by distributors and others

1. Every person who imports or causes to be imported into this state, or who produces, refines, manufactures or compounds within this state, or who purchases or sells in this state motor fuel or diesel motor fuel or ingredients which may be manufactured or compounded into motor fuel or diesel motor fuel, shall keep a complete and accurate record of all purchases and sales or other dispositions thereof and a complete and accurate record of the number of gallons of motor fuel or diesel motor fuel or such ingredients so imported, produced, refined, manufactured or compounded.

Every person who stores motor fuel or diesel motor fuel for compensation shall keep a complete and accurate record of the identity of the person for whom such fuel is stored, the quantity and type of fuel so stored, the identity of the person to whom such fuel is released from storage and the quantity and type of fuel so released. Such records shall be in such form and contain such other information as the tax commission shall prescribe. Said commission, by rule or regulation, also may require the delivery of statements to purchasers with consignments of motor fuel or diesel motor fuel or such ingredients, and prescribe the matters to be contained therein. Such records and statements, unless required by the tax commission to be preserved for a longer period, shall be preserved for a period of two years and shall be offered for inspection at any time upon oral or written demand by the commissioner of taxation and finance or his duly authorized agents. The tax commission is hereby further authorized to examine the equipment of any such person pertaining to the storage, sale or delivery of such fuels, as well as the stock of such fuels in the possession or control of such person. To verify the amount of tax due under this article, each such person is hereby directed and required to give to the tax commission or its duly authorized representatives, the means, facilities and opportunity for such examinations as are herein provided for and required. Nothing in this section contained shall be construed to require the keeping of a record of purchases or sales of motor fuel or diesel motor fuel or such ingredients at retail in small quantities or of motor fuel or diesel motor fuel imported into this state in the tank of a motor vehicle which supplies the fuel for its operation."

"§ 287. Payment of tax; returns

1. Every distributor shall, on or before the twentieth day of each month, file with the department of taxation and finance a return, on forms to be prescribed by the tax commission and furnished by such department, stating the number of gallons of motor fuel imported, manufactured or sold by such distributor in the state during the preceding calendar month, except that the tax commission may, if it deems it necessary in order to insure the payment of the taxes imposed by this article, require returns to be made at such times and covering such periods as it may deem necessary, and, by regulation, may permit the filing of returns by distributors of Diesel motor fuel on a quarterly, semiannual or annual basis, or may waive the filing of returns by a distributor of Diesel motor fuel for such time and upon such terms as it may deem proper if satisfied that no tax imposed by this article with respect to Diesel motor fuel is or will be payable by him during the time for which returns are waived. Such returns shall contain such further information as the tax commission shall require. The fact that a distributor's name is signed to a filed return shall be prima facie evidence for all purposes that the return was actually signed by such distributor. Each such distributor shall pay to the department with the filing of such return, the taxes imposed by this article on each gallon of motor fuel imported, manufactured or sold by such distributor in the state, and so reported, during the period covered by such return, except that, where a distributor has purchased motor fuel upon which the taxes imposed by this article have been paid or paid over and in each instance the tax is included in

the price, a credit shall be allowed for the amount of such taxes upon the subsequent sale of such fuel to the extent that such taxes are so paid and included in the price.

"2. A distributor entitled to a refund under the provisions of section two hundred eighty-nine-c of this chapter, in lieu of such refund, may take credit therefor on a return filed pursuant to this section, unless the tax commission shall withdraw such privilege."

"§ 289-c. Refunds

"1. The tax imposed by this article though payable by the distributor, shall be borne by the purchaser and when paid by the distributor shall be deemed to have been so paid for the account of the purchaser. No person shall sell, advertise, or offer for sale motor fuel, separate from the tax herein imposed; and the price paid by the purchaser for motor fuel on which the tax has been paid, if such price be not less than the amount of the tax thereon, shall be presumed for the purposes of this section to have included the tax.

"1-a. (a) Any person selling motor fuel to an organization described in paragraph one or two of subdivison (a) of section eleven hundred sixteen of this chapter or a hospital included in the organizations described in paragraph four of such subdivision for its own use or consumption or selling kero-jet fuel to an airline for use in its airplanes may exclude the amount of the tax or taxes imposed by this article from the selling price thereof.

"(b) Any person making a sale of motor fuel under the circumstances described in paragraph (a) of this subdivision whereby the tax or taxes imposed by this article have not been passed through to the purchaser, shall be allowed a refund or credit of the tax or taxes imposed by this article in the amount of such tax or taxes paid by such person on the motor fuel being sold or included in the price paid by such person for such fuel. Claims for refunds or credits shall be presented, and refunds or credits shall be made, only as authorized by the tax commission under such rules and regulations as it may prescribe.

"2. However, the intention of this article is to place the ultimate burden resulting from such tax, so far as possible, on persons who use the public highways of the state for operating motor vehicles thereon, or who use the waterways of the state including any other waterways bordering on the state for operating pleasure or recreational motor boats thereon, and the following refunds are provided to that end, subject to the provisions of subdivision five of this section.

"3. (a) Except as otherwise provided in paragraph (b) of this section, any person who shall buy any motor fuel or diesel motor fuel, on which the tax imposed by this article shall have been paid, and shall consume the same in any manner except in the operation of a motor vehicle upon or over the highways of this state, or in the operation of a pleasure or recreational motor boat upon or over the waterways of the state including waterways bordering on the state, shall be reimbursed the amount of such tax in the manner and subject to the condi-

tions herein provided except that there shall be no reimbursement of tax paid on motor fuel or diesel motor fuel taken out of this state in a fuel tank connected with the engine of a motor vehicle and consumed outside of this state.

"(b) Any omnibus carrier which shall buy any motor fuel on which the aggregate tax imposed by section two hundred eighty-four and section two hundred eighty-four-a of this chapter, or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a and section two hundred eighty-two-b of this chapter, shall have been paid, shall be reimbursed, in the case of such motor fuel, the amount paid pursuant to such sections two hundred eighty-four and two hundred eighty-four-a in excess of four cents per gallon, and in the case of diesel motor fuel, the account paid pursuant to such sections two hundred eighty-two-a and two hundred eighty-two-b in excess of six cents per gallon, provided such motor fuel or diesel motor fuel has been consumed by such carrier in the operation of an omnibus in this state. Any taxicab licensee, as defined by subdivision ten of section two hundred eighty-two of this chapter, who or which shall buy any motor fuel on which the aggregate tax imposed by section two hundred eighty-four and section two hundred eighty-four-a of this chapter or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a and section two hundred eighty-two-b of this chapter, shall have been paid, shall be reimbursed, in the case of such motor fuel, the amount paid pursuant to such sections two hundred eighty-four and two hundred eighty-four-a in excess of four cents per gallon, and in the case of diesel motor

fuel, the amount paid pursuant to such sections two hundred eighty-two-a and two hundred eighty-two-b in excess of six cents per gallon, provided such motor fuel or diesel fuel has been consumed by such licensee in the operation of a taxicab in this state.

"(c) All claims for reimbursement shall be in such form and contain such information, and be presented within such time as the state tax commission, by rules and regulations, shall prescribe. Every such claim shall include a certificate by or on behalf of the party presenting the same to the effect that it is just, true and correct, that no part thereof has been paid, except as stated therein, and that the balance therein stated is actually due and owing. The claimant shall satisfy the department of taxation and finance that he has borne the tax and that the motor fuel has been consumed by him in a manner other than the operation of a motor vehicle upon or over the highways of this state, the operation of a pleasure or recreational motorboat upon or over the waterways of the state including waterways bordering on the state or, in the case of an omnibus carrier, taxicab licensee, nonpublic school operator or volunteer ambulance service, that he has borne the tax and that the amount claimed is the amount of such tax reimbursable under paragraph (b), (d), (e) or (f) of subdivision three of this section. The department may require such further information or proof as it shall deem necessary for the administration of such claim. Claims for reimbursement approved by the department of taxation and finance shall be paid from revenues collected under this article and deposited to the credit of the comptroller as hereinafter provided; but no such claims shall be paid unless the department of taxa-

tion and finance is satisfied that the amount of the tax for which the reimbursement is claimed has actually been collected by the state. The amount of any erroneous or excessive payment to a claimant for reimbursement may be determined by the department of taxation and finance and may be recovered from such claimant in the same manner as a tax imposed by this article, provided, however, that any such determination shall be made within two years after the date of such erroneous or excessive payment.

"(d) Any omnibus carrier which shall buy motor fuel on which the aggregate tax imposed by section two hundred eighty-four, section two hundred eighty-four-a and section two hundred eighty-four-c of this chapter or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a, section two hundred eighty-two-b and section two hundred eighty-two-c of this chapter shall have been paid, shall be reimbursed the amount paid provided such motor fuel or diesel motor fuel has been consumed by such carrier in the operation of an omnibus in local transit service in this state pursuant to a certificate of convenience and necessity issued by the commissioner of transportation of this state or by the interstate commerce commission of the United States or pursuant to a contract franchise or consent between such carrier and a city having a population of more than one million inhabitants, or any agency of such city.

"(e) Any nonpublic school operator which shall buy motor fuel on which the aggregate tax imposed by section two hundred eighty-four, section two hundred eighty-four-a and section two hundred

eighty-four-c of this chapter or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a, section two hundred eighty-two-b and section two hundred eighty-two-c of this chapter shall have been paid, shall be reimbursed the amount paid provided such motor fuel or diesel motor fuel has been consumed by such nonpublic school operator exclusively in educational related activities.

"(f) Any voluntary ambulance service, as defined in section thirty hundred one of the public health law, which shall buy motor fuel on which the tax or taxes imposed by this article shall have been paid shall be reimbursed the amount of such tax in the manner and subject to the conditions herein set forth, provided such motor fuel has been consumed by such volunteer ambulance service vehicle in the course of operating within the state.

"(g) An organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter or a hospital included in the organizations described in paragraph four of such subdivision, or a fire company or fire department, as defined in section three of the volunteer firefighters' benefit law, or a volunteer rescue squad supported in whole or in part by tax money where any such entity is the purchaser, user or consumer of motor fuel or diesel motor fuel in a vehicle owned and operated by it and used exclusively for its purposes, or an airline where it has purchased kero-jet fuel for use in its airplanes shall be reimbursed the amount of the taxes on motor fuel and diesel motor fuel imposed by or pursuant to the authority of this article included in the price paid for such motor fuel or diesel motor fuel.

"4. "Highway," within the meaning of this section, means a highway, street, avenue, road, alley, boulevard, parkway, or other similar thoroughfare.

"5. If the provisions of this section providing for reimbursement of the amount of the tax paid be held unconstitutional by a court of competent jurisdiction, the other constitutional provisions of this article nevertheless shall stand, it being the express intention of the legislature that even though such provision for reimbursement be held unconstitutional the tax provided for by this article shall be imposed, collected and distributed as provided in this article, regardless in that event of the manner in which the motor fuel is consumed.

"6. Moneys paid in error under this article may be refunded. Where motor fuel, upon which the tax imposed by this article has been paid, is sold, under such circumstances that, if the tax had not been paid, the sale would not have been taxable under this article, the tax may be refunded. Refunds shall be made only as authorized by the tax commission under such rules and regulations as it may prescribe provided an application therefor is filed with the tax commission within two years from the time the erroneous payment was made, or tax paid motor fuel was so sold. Refunds authorized by the tax commission shall be paid from revenues collected under this article and deposited to the credit of the comptroller as hereinafter provided.

"7. If an agreement under the provisions of section two hundred eighty-eight (extending the period for determination of tax imposed by this article) is

made within the two-year period for the filing of an application for refund under subdivision six of this section or, in the case of a claim for reimbursement under subdivision three of this section, if such agreement is made within two years from the date of purchase of the motor fuel, the period for filing an application for refund or a claim for reimbursement shall not expire prior to six months after the expiration of the period within which determination may be made pursuant to the agreement or any extension thereof.

"8. With respect to motor fuel imported, manufactured or sold or purchased in this state, a refund or credit shall be allowed a distributor or a purchaser duly registered with or licensed by the taxing authorities of another state as a distributor of or a dealer in motor fuel therein, of the tax required to be paid pursuant to this article upon motor fuel in the amount of such tax paid by or included in the price paid by a distributor or such purchaser to the seller thereof if such fuel was exported from this state for sale outside this state and in connection with such exportation such fuel was immediately shipped to an identified facility outside this state provided the applicant complies with all requirements and rules and regulations of the tax commission, including evidentiary requirements, relating thereto; and provided further that upon receipt of a claim for refund in processible form, interest shall be allowed and paid at the rate set by the tax commission pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter from the due date of the return to the date immediately preceding the date of the refund check except no such interest shall be allowed or

paid if the refund check is mailed within thirty days of such receipt and except no interest shall be allowed or paid if the amount thereof would be less than one dollar.

"9. With respect to any organization described in paragraph four of subdivision (a) of section eleven hundred sixteen of this chapter which is eligible pursuant to this section for reimbursement of the tax required to be paid pursuant to this article, upon receipt of a claim for reimbursement in processible form, interest shall be allowed and paid at the rate set by the tax commission pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter from the date of the application for reimbursement to the date immediately preceding the date of the reimbursement check except no such interest shall be allowed or paid if the reimbursement check is mailed within forty-five days of such receipt and except no interest shall be allowed or paid if the amount thereof would be less than one dollar. Provided, however, the department shall process applications for reimbursement as expeditiously as possible."

"§ 1101 (b) (4) (ii):

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, no motor fuel shall be sold or used in this state without payment, and inclusion in the sales price of such motor fuel, of the tax on motor fuel required to be prepaid pursuant to the provisions of subdivisions (a) and (b) of section eleven hundred two of this article except where a provision of this article relating to motor fuel specifically provides otherwise and except in the

case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, respectively, of this article. Provided, however, except for such requirement of prepayment of tax required by such subdivisions of such section, the provisions of this subparagraph shall not otherwise modify the meaning of the term "retail sale" as used in this article. For purposes of this subparagraph and sections eleven hundred two, eleven hundred eleven, eleven hundred twenty, eleven hundred thirty-two, eleven hundred thirty-four, eleven hundred thirty-five, eleven hundred thirty-six and eighteen hundred seventeen of this chapter, the following terms shall have the following meanings:

"(A) "Automotive fuel" means diesel motor fuel as defined in section two hundred eighty-two-a of this chapter, other than kerosene or propane used for residential purposes, or motor fuel as defined in subdivision two of section two hundred eighty-two of this chapter. The phrase "used for residential purposes" shall have the same meaning as it has for purposes of section eleven hundred five-A of this article.

"(B) The term "distributor" shall have the same meaning as it has for purposes of article twelve-A of this chapter, excluding persons who are not required pursuant to section two hundred eighty-two-a to pay the tax imposed thereby.

"(C) The term "motor fuel" means motor fuel as defined in subdivision two of section two hundred eighty-two of this chapter.

"(D) The terms "filling station" and "owner" shall have the same meaning as they have for the purposes of article twelve-A of this chapter."

"§ 1102. Prepayment of sales tax on motor fuel

(a) Every distributor shall pay, as a prepayment on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter, a tax on each gallon of motor fuel (i) which he imports or causes to be imported into this state for use, distribution, storage or sale in the state or produces, refines, manufactures or compounds in this state or (ii) if the tax has not been imposed prior to its sale in this state, which he sells (which acts shall in regard to motor fuel hereinafter in this article be emcompassed by the phrase "imported, manufactured or sold"). The amount of such prepayment per gallon shall be computed pursuant to the provisions of subdivision (e) of section eleven hundred eleven of this article. No provision of this section shall apply or be construed to apply to foreign or interstate commerce except insofar as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto. Provided, further, no motor fuel shall be included in the measure of the tax under clause (i) of this subdivision unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution.

"(b) The taxes required to be prepaid pursuant to this section shall be administered and collected in a like manner as the taxes imposed by sections eleven hundred five and eleven hundred ten of this article.

All the provisions of this article relating to or applicable to the administration, collection and disposition of the taxes imposed by such sections shall apply to the tax required to be prepaid under this section so far as such provisions can be made applicable to such prepayments of tax with such limitations as set forth in this article and such modifications as may be necessary in order to adapt such language to the tax so imposed, provided, however, that the provisions of paragraph one of subdivision (c) of section eleven hundred thirty-seven of this article and the reference in section eleven hundred thirty-seven-A of this article to such paragraph one of subdivision (c) of section eleven hundred thirty-seven shall not be applicable to such tax required to be prepaid under this section. Such provisions shall apply with the same force and effect as if the language of those provisions had been set forth in full in this section except to the extent that any provision is either inconsistent with a provision of this section or is not relevant to the tax required to be prepaid by this section. For purposes of this section, any reference in this article to the tax or taxes imposed by this article shall be deemed to refer to the tax required to be prepaid pursuant to this section unless a different meaning is clearly required. Provided, further, that, except as otherwise provided in subdivision (j) of section eleven hundred fifteen of this article and except as otherwise provided in paragraph five of subdivision (b) of section eleven hundred sixteen of this article, the exemptions provided in such sections (other than that provided in paragraph nine of subdivision (a) of such section eleven hundred fifteen with respect to purchases of kero-jet fuel) shall not apply to the tax required to be prepaid under this section.

"(c) Nothing in this article shall be construed to require the payment of the tax required to be prepaid pursuant to this section more than once upon motor fuel sold within the state. When the foregoing prepaid tax imposed pursuant to this section is paid it shall have been so paid on account of the taxes imposed by this article or pursuant to the authority of article twenty-nine of this chapter with respect to the retail sale or use of motor fuel. Nothing in this section shall modify or affect the taxes imposed by sections eleven hundred five and eleven hundred ten of this article as applied to receipts from the sale or use of motor fuel.

"(d) Deposit and disposition of revenue. (1) Consistent with sections eleven hundred forty-eight and twelve hundred sixty-one of this chapter, the taxes imposed pursuant to this section and interest and penalties thereon received by the tax commission, after deducting the amount which the commissioner of taxation and finance or his delegate shall determine to be necessary for reasonable costs of the tax commission in administering, collecting and distributing such taxes, shall be deposited daily with such responsible banks, banking houses or trust companies, as may be designated by the comptoller, to the credit of the comptroller. Of the total revenue collected or received under this section, the comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds under this article and pursuant to the authority of article twenty-nine of this chapter.

"(2) On or before the twelfth day of each month, after reserving such amount for such refunds and

such costs, the commissioner of taxation and finance or his delegate shall certify to the comptroller the amount of all revenues so received during the prior month as a result of the taxes, interest and penalties so imposed and, in addition, on or before the last day of June and December the commissioner or delegate shall certify the amount of such moneys received during and including the first twenty-five days of said months. At the time he prepares such certification, the commissioner of taxation and finance or his delegate shall determine the receipts attributable to the amount of motor fuel sold at retail in each county and city and in the metropolitan commuter transportation district subject to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article and the like taxes imposed pursuant to the authority of article twenty-nine of this chapter and he shall certify the portion of such receipts from the total payments that represents the prepaid tax on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter (determined without regard to the taxes imposed by this section and any like taxes imposed pursuant to the authority of article twenty-nine of this chapter) based upon the retail sales or uses of such fuel in such jurisdiction or district. The amount of revenues so certified shall be deposited and distributed by the comptroller in accordance therewith. Where the amount so certified in any distribution is more or less than the amount due, the amount of the overpayment or underpayment shall be determined as soon after the discovery of the overpayment or underpayment as is reasonably possible and subsequent certifications to the comptroller shall be adjusted by subtracting the amount

of any such overpayment from or by adding the amount of any such underpayment to such number of subsequent payments as the comptroller and the new commissioner of taxation and finance shall consider reasonable in view of the amount of the overpayment or underpayment and all other pertinent facts and circumstances.

"(e) For the purposes of this section and section two hundred eighty-four of this chapter the term "use" shall mean, in addition to the meaning set forth in paragraph seven of subdivision (b) of section eleven hundred one of this article, the exercise of any right or power over motor fuel by any person, whether or not a purchaser, including, but not limited to, the receiving, the withdrawal from storage or any consumption of such motor fuel."

"§ 1132. Collection of tax from customer; proof required for registration of motor vehicles

* * *

"(c) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement to tax until the contrary is established and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) of this section, unless (1) a vendor, not later than ninety days after delivery of the property

or the rendition of the service, shall have taken from the purchaser a certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address and, except as otherwise provided by regulation of the tax commission the number of his registration certificate together with such other information as said commission may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where the certificate requires the inclusion of the purchaser's registration certificate number or other identification number required by regulations of the tax commission, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four, or (2) the purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise which the tax commission may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. Where a certificate or document referred to in the previous sentence is received within the time limit set forth therein, but is deficient in some material manner, and where such deficiency is thereafter removed, the receipt of such certificate or document shall be deemed to have satisfied all of the requirements of the preceding sentence. Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely upon the customer. The

vendor shall not be required to collect tax from purchasers who furnish a certificate of resale, an exempt organization statement or other exemption certificate in proper form, unless, in the case of a certificate described in clause one of the second sentence of this subdivision whereon the purchaser's registration certificate number, or other identification number required by regulation of the tax commission, is required to be included, such purchaser's certificate of authority is invalid because it has been suspended or revoked as provided in section eleven hundred thirty-four and the tax commission has furnished registered vendors with information identifying those persons whose certificates of authority have been suspended or revoked, or unless such purchaser's certificate of authority is invalid because it has expired, and the tax commission has provided registered vendors with a means of determining whether such expiration has occurred. Where the vendor accepts such a certificate from a person identified by the tax commission as one whose certificate of authority has been suspended or revoked or from a person whose certificate of authority has been identified as having expired, the receipt, amusement charge or rent from such transaction shall be deemed to be a taxable sale at retail. Provided, however, the tax commission may authorize a purchaser, who acquires tangible personal property or services under circumstances which make it impossible at the time of acquistion to determine the manner in which the tangible personal property or services will be used, to pay the tax directly to the tax commission and waive the collection of the tax by the vendor. Subject to such reasonable conditions as the tax commission may require, the tax commission shall authorize an omnibus carrier described in subdivi-

sion (b) of section eleven hundred nineteen to pay the tax on the purchase or use of an omnibus directly to the tax commission and waive the collection of the tax by the vendor. No such authority shall be granted or exercised except upon application to the tax commission, and the issuance by the tax commission, in its discretion, of a direct payment permit. If a direct payment permit is granted, its use shall be subject to conditions specified by the tax commission, and the payment of tax on all acquisitions pursuant to the permit shall be made directly to the tax commission by the permit holder. The tax commission may suspend or revoke a direct payment permit where the permit holder fails to comply with any of the provisions of this article or any rule promulgated by the tax commission with respect to this article. The notice and hearing provisions applicable to the revocation and suspension of certificates of authority under section eleven hundred thirty-four shall apply to th suspension and revocation of direct payment permits. A vendor shall not be required to collect tax from a purchaser who furnishes a direct payment permit in proper form, unless such purchaser's direct payment permit has been suspended or revoked by the tax commission and the tax commission has provided registered vendors with information identifying those persons whose direct payment permits have been suspended or revoked. Where a vendor accepts a direct payment permit from a person whose direct payment permit has been suspended or revoked, and the tax commission has provided registered vendors with information identifying those persons whose direct payment permits have been suspended or revoked, the receipt, amusement charge or rent from such transaction shall be deemed to be subject to tax."

"§ 1134. Registration

(a) (1) (i) Every person required to collect any tax imposed by this article commencing business or opening a new place of business, (ii) every person purchasing or selling tangible personal property for resale commencing business or opening a new place of business, (iii) every person selling automotive fuel including persons who or which are not distributors, (iv) every person described in this subdivision who takes possession of or pays for business assets under circumstances requiring notification by such person to the tax commission pursuant to subdivision (c) of section eleven hundred forty-one of this chapter and (v) every person described in subparagraph (i), (ii), (iii) or (iv) who or which has had its certificate of authority revoked under paragraph four of this subdivision, shall file with the tax commission a certificate of registration, in a form prescribed by it, at least twenty days prior to commencing business or opening a new place of business or such purchasing, selling or taking of possession or payment, whichever comes first. Information with respect to the notice requirements of a purchaser, transferee or assignee and his liability for the payment of taxes pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter shall be included in or accompany the certificate of registration form furnished the applicant. The tax commission shall also include with such information furnished to each applicant general information about the tax imposed under this article including information on records to be kept, returns and payments, notification requirements and forms. Such certificate of registration may be amended in accordance with rules promulgated by the tax commission.

"(2) Except as otherwise provided in this section, the tax commission, within five days after receipt of a certificate of registration filed as provided for in paragraph one of this subdivision, shall issue, without charge, to each registrant a certificate of authority empowering him to collect the tax and a duplicate thereof for each additional place of business of such registrant. Such certificate of authority may be issued for a specified term of not less than three years, subject to renewal in accordance with rules promulgated by the tax commission. Whether or not such certificate of authority is issued for a specified term, such certificate shall be subject to suspension or revocation as provided for in this section. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificate of authority or duplicate shall be prominently displayed in the place of business of the registrant to which it applies. A registrant who has no regular place of doing business shall attach such certificate to each of his carts, stands, trucks or other merchandising devices. Such certificates of authority and any duplicate shall be nonassignable and nontransferable and shall be surrendered to the tax commission immediately upon the registrant's ceasing to do business at the place named (unless the registrant amends his certificate of registration in accordance with rules promulgated by the tax commission) or in the event that such business never commenced.

"(3) A person, other than one described in clauses (A), (B) and (C) of paragraph (8) of subdivision (b) of section eleven hundred one, but who makes sales to persons within the state of tangible personal property or services, the use of which is subject to tax under this article, may if he so elects

file a certificate of registration with the tax commission which may, in its discretion and subject to such conditions as it may impose, issue to him a certificate of authority to collect the compensating use tax imposed by this article.

"(4) (A) Where a person who holds a certificate of authority (i) willfully fails to file a report or return required by this article, (ii) willfully files, causes to be filed, gives or causes to be given a report, return, certificate or affidavit required under this article which is false, (iii) willfully fails to comply with the provisions of paragraph two or three of subdivision (e) of section eleven hundred thirty-seven of this article, (iv) willfully fails to collect, truthfully account for or pay over any tax imposed under this article or pursuant to the authority of article twenty-nine of this chapter, or (v) has been convicted of a crime provided for in this chapter, the tax commission may revoke or suspend such certificate of authority and all duplicates thereof. Provided, however, that the tax commission may revoke or suspend a certificate of authority based on the grounds set forth in clause (v) of this subparagraph only where the conviction referred to occurred not more than one year prior to the date of revocation or suspension.

"(B) Where a person files a certificate of registration for a certificate of authority under this subdivision and in considering such application the tax commission ascertains that (i) any tax imposed under this chapter or any related statute, as defined in section eighteen hundred of this chart, has been finally determined to be due from such person and has not been paid in full, (ii) a tax due under this article or any law, ordinance or resolution enacted

pursuant to the authority of article twenty-nine of this chapter has been finally determined to be due from an officer, director, partner or employee of such person in his capacity as a person required to collect tax on behalf of such person or another person and has not been paid, (iii) such person has been convicted of a crime provided for in this chapter within one year from the date on which such certificate of registration is filed, (iv) an officer, director, partner or employee of such person, which officer, director, partner or employee is a person required to collect tax on behalf of such person filing a certificate of registration has in his capacity as a person required to collect tax on behalf of such person or of another person been convicted of a crime provided for in this chapter within one year from the date on which such certificate of registration is filed, (v) a shareholder owning more than fifty percent of the number of shares of stock of such person (where such person is a corporation) entitling the holder thereof to vote for the election of directors or trustees, who owned more than fifty percent of the number of such shares of another person (where such other person is a corporation) at the time any tax imposed under this chapter or any related statute as defined in section eighteen hundred of this chapter was finally determined to be due and where such tax has not been paid in full, or at the time such other person was convicted of a crime provided for in this chapter within one year from the date on which such certificate of registration is filed, or (vi) a certificate of authority issued to such person has been revoked or suspended pursuant to subparagraph (A) of this paragraph within one year from the date on which such certificate of registration is filed, the tax commission may refuse to issue a certificate of authority.

"(C) In any of the foregoing instances where the tax commission may suspend or revoke or refuse to issue a certificate of authority, the tax commission may condition the retention or issuance of a certificate of authority upon the filing of a bond or the deposit of tax in the manner provided in paragraph two or three of subdivision (e) of section eleven hundred thirty-seven.

"(D) Notice of proposed revocation, suspension or refusal to issue shall be given to the person holding a certificate of authority issued pursuant to this subdivision or to a person applying for such a certificate in the manner prescribed for a notice of determination of tax and all the provisions of this article applicable to a notice of determination under section eleven hundred thirty-eight shall apply to a notice issued pursuant to this paragraph, insofar as such provisions can be made applicable to the notice authorized by this paragraph, with such modifications as may be necessary in order to adapt the language of such provisions to the notice authorized by this paragraph. In the case of a person applying for a certificate of authority a notice of proposed refusal to issue shall be issued within five days after timely registration pursuant to paragraph one of subdivision (a) of this section. Upon timely application therefor, a hearing shall be scheduled and within three months from such application for hearing (determined with regard to any postponements of any scheduled hearing or conference made at the request of the applicant) the tax commission shall issue either a notice of refusal or a certificate of authority. If the tax commission fails to issue a notice of refusal within such three month period (or such period as extended pursuant to this subdivision), the tax commission shall im-

mediately upon the conclusion of such period issue a certificate of authority to the applicant. Such notice of proposed revocation or suspension must be given to such person within three years from the date of the act or omission described in subparagraph (A) of this paragraph, except that in the case of acts involving falsity or fraud, such notice may be issued at any time. All of such notices shall contain a statement advising the person to whom it is issued that the suspension, revocation or refusal to issue may be challenged through a hearing process and that the petition for such challenge must be filed with the tax commission within ninety days after the giving of such notice.

"(E) After the tax commission has suspended or revoked a person's certificate of authority, by a notice of suspension or revocation, or has refused to issue a certificate of authority, by a notice of refusal, to such person and such decision has become final as provided for in this pragraph, or after a person's certificate of authority has expired and such person has failed to renew such certificate or obtain a new certificate of authority, such person is prohibited from engaging in any business in this state for which a certificate of authority is required. If despite such prohibition such person continues to be so engaged in business, the tax commission may bring an action to enjoin such person from so engaging in business.

"(5) If the tax commission considers it necessary for the proper administration of the sales and use taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter, it may require every person under this section or section twelve hundred fifty-three of this chapter who

holds a certificate of authority to file a new certificate of registration in such form and at such time as the tax commission may prescribe and to surrender such certificate of authority. The tax commission may require such filing and such surrender not more often than once every three years. Upon the filing of such certificate of registration and the surrender of such certificate of authority, the tax commission shall issue, within such time as it may prescribe, a new certificate of authority, without charge, to each registrant and a duplicate thereof for each additional place of business of such registrant.

"(b) (1) Every promoter of a show shall, at least ten days prior to the opening of such show, file with the tax commission a notice stating the location and dates of such show, in a form prescribed by the tax commission.

"(2) The tax commission shall, within five days after the receipt of any such notice, issue to the promoter, without charge, a permit to operate such show, except as provided by paragraph five of this subdivision. No promoter shall rent, lease or grant a license to use space for a show or operate a show without obtaining such permit. Such permit shall be prominently displayed at the main entrance to the show. However, if a notice required under paragraph one has been properly filed, and if a permit has not been received by the promoter prior to the opening of the show, the requirements contained in this subdivision with respect to obtaining and displaying such a permit shall be deemed to have been complied with, unless and until the promoter receives a notice from the tax commission, sent by registered or certified mail, denying the ap-

plication for a permit based on the existence of an order previously issued under paragraph five of this subdivision and in effect as of the date of issuance of such notice denying the application. An applicant shall have a right to a hearing before the tax commission to contest such a notice of denial. If a permit is received after a show has commenced but before it has been terminated, the promoter must commence to display such permit as provided for in this paragraph.

"(3) Any promoter who is a "person required to collect any tax imposed by this article" as defined in subdivision one of section eleven hundred thirty-one, shall comply with all of the provisions of this article relating to such persons as well as with all of the provisions of this article relating to promoters.

"(4) A promoter shall not permit any person to display for sale or to sell tangible personal property or services subject to tax at a show unless such person is registered under subdivision (a) of this section and displays his certificate of authority in accordance with the provisions of such subdivision.

"(5) Any promoter who fails to file a notice of a show, operates a show without a permit, fails to file a report of a show, files a report which is wilfully false, or fails to comply with any provision contained in this article or any regulation promulgated by the tax commission pertaining to shows shall, after an opportunity for a hearing has been afforded, be subject to the revocation of all existing permits issued, pursuant to this section, to operate a show. The state tax commission may, after an opportunity for a hearing has been afforded, also issue an order denying such promoter a permit to

operate a show for a period of not more than six months from the date of such order. Such penalties shall be in addition to any penalties imposed pursuant to subdivision (b) of section eleven hundred forty-five."

"§ 1135. Records to be kept

(a) Every person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the tax commission may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately.

"(b) Every promoter shall keep a record of the date and place of each show and the name, address and certificate of authority number of every person whom he permits to display for sale or to sell tangible personal property or services subject to tax at such show.

"(c) Ever person selling or holding large volumes of automotive fuel shall keep records for such periods and in the manner prescribed by the tax commission pursuant to rules and regulations. Such records shall show (1) the number of gallons of automotive fuel purchased, the price paid therefor, the amount of tax paid pursuant to the provisions of section eleven hundred two of this article and the regional average retail sales price applicable thereto and (2) the number of gallons sold, and the price paid by the purchaser to whom such

person sells the automotive fuel, and the amount of tax included in such price pursuant to the provisions of section eleven hundred two of this article and the regional average retail sales price or the amount of tax collected pursuant to the provisions of subdivision (a) of section eleven hundred five of this article applicable to such sale together with such additional information as the tax commission shall require. The regional average retail sales price, and the amount of tax shall be calculated in the manner set forth in section eleven hundred eleven of this article.

"(d) Such records shall be available for inspection and examination at any time upon demand by the tax commission or its duly authorized agent or employee and shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer. Such records may be kept within the meaning of this section when reproduced on any photographic, photostatic, microfilm, micro-card, miniature photographic or other process which actually reproduced the original record."

"§ 1136. Returns

(a) Every person required to register with the tax commission as provided in section eleven hundred thirty-four whose taxable receipts, amusement charges and rents total less than three hundred thousand dollars, or in the case of any such person whose sales of automotive fuel total less than one hundred thousand gallons, in every quarter of the preceding four quarters shall only file a return quarterly with the tax commission and every person

required to so register whose taxable receipts, amusement charges and rents total three hundred thousand dollars or more, or in the case of any such person whose sales of automotive fuel total one hundred thousand gallons or more in any quarter of the preceding four quarters shall, in addition to filing a quarterly return, and except as otherwise provided in section eleven hundred two of this article, file either, a long-form or short-form, part-quarterly return monthly with the tax commission. However, a person required to register only because he is purchasing or selling tangible personal property for resale, and who is not required to collect any tax or pay any tax directly to the tax commission under this article, shall file an information return annually in such form as the tax commission may prescribe, or in the case of a person, who or which is not a distributor, required to register because he is selling automotive fuel, shall file an information return quarterly or, if the tax commission deems necessary, monthly, in such form as the tax commission shall prescribe. The return of a vendor of tangile personal property or services shall show his receipts from sales and also the aggregate value of tangible personal property and services sold by him, the use of which is subject to tax under this article, and the amount of tax payable thereon pursuant to the provisions of section eleven hundred thirty-seven. The return of a recipient of amusement charges shall show all such charges and the amount of tax thereon, and the return of an operator required to collect tax on rents shall show all rents received or charged and the amount of tax thereon. The returns of any seller of automotive fuel shall show the number of gallons of automotive fuel sold, together with such additional information as the tax commission shall require in

order to certify the amount of taxes, penalties and interest payable to local taxing jurisdictions imposed on the sale or use of automotive fuel pursuant to the provisions of section twelve hundred sixty-one of this chapter. Taxable receipts as used in this section shall mean and include taxable receipts from the sale of automotive fuel and any receipts from the sale of motor fuel in this state whether or not such receipts are subject to the taxes imposed by section eleven hundred two, eleven hundred five or eleven hundred ten of this article and regardless of whether the provisions of section eleven hundred twenty of this article are applicable to the taxes imposed in respect of such receipts.

"(i) For purposes of this article the term "long-form, part-quarterly return" shall mean a return in a form determined by the tax commission providing for the calculation of the actual sales and compensating use taxes for the preceding month in the manner set forth in subdivisions (a) and (b) of section eleven hundred thirty-seven. A person filing a long-form, part-quarterly return for each of the months contained in a quarter shall also be required to file a quarterly return for such quarter.

"(ii) For purposes of this article the term "short-form, part-quarterly return" shall mean a return which shall be available for use in filing as a return for the first two months of any quarter and only by a person required to file a return monthly who has had at least four successive quarterly tax periods immediately preceding the month for which the return is to be filed and who elects such use, and is in a form determined by the tax commission and providing for the calculation of one-third of the total state and local sales and compensating use

taxes paid by the person to the tax commission in the comparable quarter of the immediately preceding year under this article and as taxes imposed pursuant to the authority of article twenty-nine with respect to all receipts, amusement charges and rents.

"(b) The returns and information returns required by this section to be filed quarterly shall be filed for quarterly periods ending on the last day of February, May, August and November of each year, and each return and each information return shall be filed within twenty days after the end of the quarterly period covered thereby. The returns required by this section to be filed monthly shall be filed for monthly periods ending on the last day of each month and each return shall be filed within twenty days after the end of each prior month. The information returns required to be filed annually shall be filed for twelve month periods ending on the last day of May of each year, and each such information return shall be filed within twenty days after the end of the twelve month period covered thereby.

"(c) The tax commission may permit or require returns to be made covering other periods and upon such dates as it may specify. If the tax commission deems it necessary in order to insure the payment of the taxes imposed by this article, it may require returns to be made for shorter periods than those prescribed pursuant to the foregoing subdivisions of this section, and upon such dates as it may specify.

"(d) The form of returns shall be prescribed by the tax commission and shall contain such informa-

tion as it may deem necessary for the proper administration of this article. The commission may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

"(e) The tax commission may by regulation require lessors as defined in paragraph (8) of subdivision (d) of section eleven hundred one to file information returns showing all leases, subleases and licenses to use granted to persons who make amusement charges, and may prescribe the form of such returns, the time when they are to be filed and the information to be contained therein.

"(f) Every promoter shall file a report monthly, within twenty days after the end of the prior month, for all shows with respect to which he was a promoter in such prior month, listing the date and place of each show and the name, address and certificate of authority number, by show, of every person whom he permitted to display for sale or to sell tangible personal property or services subject to tax at such show. Every person shall furnish the promoter of any show at which he displays for sale or sells tangible personal property or services subject to tax, with a statement of his name, address and certificate of authority number for the promoter's use in filing the report required herein."

"§ 1137. Payment of tax

(a) Every person required to file a return under the preceding section whose total taxable receipts, amusement charges and rents are subject to the tax imposed pursuant to subdivisions (a), (c), (d), (e) and (f) of section eleven hundred five of this article

shall, at the time of filing such return, pay to the tax commission the total of the following:

"(i) Four percent of the total of all receipts, amusement charges and rents subject to tax under this article, and if any of such receipts, amusement charges and rents are subject to local tax imposed pursuant to article twenty-nine of this chapter, an additional percentage of the total thereof equal to the percentage rate of such local tax;

"(ii) All taxes imposed by section eleven hundred ten or pursuant to article twenty-nine of this chapter upon such person's use of property or services; and

"(iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt, amusement charge or rent not subject to tax, and all moneys collected with respect to any receipt, amusement charge or rent subject to tax, purportedly in accordance with a schedule prescribed by the tax commission but actually in excess of the amount stated in such schedule as the amount to be collected.

"(b) Every person required to file a return under the preceding section and not subject to the provisions of subdivision (a) of this section shall, at the time of filing such return, pay to the tax commission the taxes imposed by this article and pursuant to article twenty-nine as well as all other moneys collected by such person acting or purporting to act under the provisions of this article or of any local law, ordinance or resolution adopted pursuant to article twenty-nine; provided, however, that if the

tax commission shall have fixed an effective rate of tax applicable to any or all of his receipts, amusement charges and rents as provided in subdivision (d) of this section, any such person may elect, with reference to such receipts, amusement charges and rents and subject to approval by the tax commission and to such regulations as it may promulgate, to pay to said commission at the time of filing his return the total of the following:

"(i) The percentage of such receipts, amusement charges and rents fixed by the tax commission as the effective rate of tax applicable thereto;

"(ii) All taxes imposed by section eleven hundred ten or pursuant to article twenty-nine of this chapter upon such person's use of property or services; and

"(iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt, amusement charge or rent not subject to tax, and all moneys collected with respect to any receipt, amusement charge or rent subject to tax, purportedly in accordance with a schedule prescribed by the tax commission but actually in excess of the amount stated in such schedule as the amount to be collected; and

"(iv) The amount of the taxes imposed by this article and pursuant to article twenty-nine with respect to all receipts, amusement charges and rents as to which no effective rate of tax fixed by the tax commission is applicable.

"(c)(1) The provisions of subdivisions (a) and (b) of this section shall not be applicable to: (i) a person filing a short-form, part-quarterly return as defined in paragraph (ii) of subdivision (a) of section eleven hundred thirty-six hereof, who, at the time of such filing shall pay to the tax commission one-third of the total state and local sales and compensating use taxes payable by the person to the tax commission in the comparable quarter of the immediately preceding year under this article and as taxes imposed pursuant to the authority of article twenty-nine with respect to all receipts, amusement charges and rents, or (ii) a person filing a March estimated return as described in paragraph (ii) of subdivision (c) of section eleven hundred thirty-seven-A hereof who, at the time of such filing shall pay to the tax commission one-third of the sales and compensating use taxes payable by such person to the tax commission in the comparable quarter of the immediately preceding year under this article. Notwithstanding the preceding sentence, for the purposes of subparagraph (ii) of this paragraph, the sales and compensating use taxes payable in the comparable quarter of the immediately preceding year shall not include taxes imposed by section eleven hundred seven or eleven hundred eight of this article or pursuant to the authority of article twenty-nine of this chapter."

"(2) The provisions of subdivisions (a) and (b) of this section, however, shall apply to a person filing a March estimated return as described in paragraph (i) of subdivision (c) of section eleven hundred thirty-seven-A hereof who, at the time of such filing shall pay to the tax commission the sales and compensating use taxes, that are estimated to be payable by such person for such month of March.

Notwithstanding the preceding sentence, for the purposes of this paragraph, the sales and compensating use taxes that are estimated to be payable by such person for such month of March shall not include taxes imposed by section eleven hundred seven or eleven hundred eight of this article or pursuant to the authority of article twenty-nine of this chapter.

"(d) The tax commission is hereby authorized to fix the effective rate of tax applicable to any or all of the taxable receipts, amusement charges and rents of any person required to collect tax, or of any group or classification of such persons. Any effective rate so fixed shall be fixed at such a percentage rate as to require, so far as practicable, payment of an amount equal to the total taxes imposed by this article and pursuant to article twenty-nine.

"(e) (1) The amount so payable to the tax commission for the period for which a return is required to be filed shall be due and payable to the tax commission on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts, amusement charges or rents or the value of property or services sold or purchased or the taxes due thereon.

"(2) Where the tax commission, in its discretion, deems it necessary to protect the revenues to be obtained under this article, it may require any person required to collect any tax imposed by this article to file with it a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this

state as to solvency and responsibility or other security acceptable to the tax commission, in such amount as the tax commission may fix, to secure the payment or payment over of any tax, penalties or interest due or which may become due from such person under this article. In the event that the tax commission determines that such person is to file such bond or other security, it shall give notice to him to that effect specifying the amount of the bond or other security required. Such person shall file such bond or other security within thirty days after the giving of such notice unless within five days after the giving of such notice he shall request, in writing, a hearing before the tax commission at which the necessity, propriety and amount of the bond or other security shall be determined by the tax commission. Such determination shall be final and shall be complied with within thirty days after the giving of notice thereof. If securities are deposited as security under this paragraph, such securities shall be kept in the custody of the commissioner of taxation and finance and may be sold by the tax commission if it becomes necessary so to do in order to recover any sums due from such person pursuant to this article, but no such sale shall be had until after such person shall have had opportunity to litigate the validity of any tax if he elects so to do. Upon any such sale, the surplus, if any, above the sums due under this article shall be returned to such person.

"(3) As an additional or alternate requirement, whenever any person fails to collect, truthfully account for, pay over the tax, or file returns of the tax as required in this article, the tax commission, in its discretion where it deems necessary to protect the revenues to be obtained under this article, may give

notice requiring such person to collect the taxes which become collectible after the giving of such notice, to deposit such taxes in any banking institution approved by the tax commission and located in this state the deposits in which are insured by any agency of the federal government, in a separate account, in trust for any payable to the tax commission, and to keep the amount of such tax in such account until payment over to the tax commission. Such notice shall remain in effect until a notice of cancellation is given by the tax commission."

"§ 1139. Refunds

(a) In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article, or (iii) in the case of a tax due from the seller, transferor or assignor and paid by the applicant to the tax commission where the applicant is a purchaser, the transferee or assignee liable for such tax pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter, within two years after the giving of notice by the tax commission to such purchaser, transferee or assignee of the total amount of any tax or taxes which the state claims to be due from the seller, transferor or assignor. Such

application shall be in such form as the tax commission shall prescribe. No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer. Notwithstanding any other provision of this article, if the time to file an application for refund or credit of any tax, penalty or interest would otherwise have expired on or before December nineteenth, nineteen hundred sixty-nine, the time for filing such application is hereby extended to and including December twentieth, nineteen hundred sixty-nine, except that it shall be further extended, as provided in subdivision (c) of section eleven hundred forty-seven, where a taxpayer has consented in writing to the extension of the period for assessment of additional tax.

"(b) If an application for refund or credit is filed with the tax commission as provided in subdivision (a) of this section, the tax commission may grant or deny such application in whole or in part and shall notify the taxpayer by mail accordingly. Such determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination, apply to the tax commission for a hearing. After such hearing, the tax commission shall mail notice of its determination to the applicant. Such determination after a hearing may be reviewed by a proceeding pursuant to article seventy-eight of the civil practice law and rules, provided such proceeding is instituted within four months after the giving of the notice of such determination, and provided that a final determination of tax due was not previously

made. Such a proceeding shall not be instituted unless an undertaking is filed with the tax commission in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

"(c) A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined due pursuant to the provisions of section eleven hundred thirty-eight where he has had a hearing or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided. However, a person filing with the tax commission a signed statement in writing, as provided in subdivision (c) of section eleven hundred thirty-eight, before a determination assessing tax pursuant to subdivision (a) of section eleven hundred thirty-eight is issued, shall, nevertheless, be entitled to apply for a refund or credit pursuant to subdivisions (a) and (b) of this section, as long as such application is made within the time limitation set forth in such subdivision (a) or within two years of the date of payment of the amount assessed in accordance with the consent filed, whichever is later, but such application shall be limited to the amount of such payment. No refund or credit shall be made of a tax, interest or penalty paid after a determination by the tax commission made pursuant to section eleven hundred thirty-eight unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by the tax commission after a hearing or of its own motion, or in a proceeding under article seventy-eight of the

civil practice law and rules, pursuant to the provisions of said section, in which event refund or credit shall be made of the tax, interest or penalty found to have been overpaid.

"(d) Except in respect to an overpayment made on a return described in paragraph (ii) of subdivision (a) of section eleven hundred thirty-six hereof or on a return described in subdivision (c) of section eleven hundred thirty-seven-A, interest shall be allowed and paid upon any refund made or credit allowed pursuant to this section except as otherwise provided in subdivision (e) of this section and except that no interest shall be allowed or paid if the amount thereof would be less than one dollar. Such interest shall be at the rate set by the tax commission pursuant to section eleven hundred forty-two, or if no rate is set, at the rate of six per cent per annum from the date when the tax, penalty or interest refunded or credited was paid to a date preceding the date of the refund check by not more than thirty days, provided, however, that for the purposes of this subdivision any tax paid before the last day prescribed for its payment shall be deemed to have been paid on such last day. In the case of a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed. For purposes of this subdivision, a return shall not be treated as filed until it is filed in processible form. A return is in a processible form if such return is filed on a permitted form, and such return contains the taxpayer's name, address, and identifying number and the required signatures, and sufficient required information (whether on the return or on required attachments) to permit

the mathematical verification of tax liability shown on the return.

"(e) The provisions of subdivisions (a), (b) and (c) of this section shall be applicable to applications for refund or credit pursuant to section eleven hundred nineteen and subdivision (e) of section eleven hundred thirty-two, except that an application for credit may be made as provided in such section or subdivision and except that no interest shall be allowed or paid upon any refund made or credit allowed pursuant to such section or such subdivision.

"(f) Where a consumer returns a motor vehicle to and receives a refund of the full purchase price, capitalized cost or a portion thereof from the manufacturer in accordance with the provisions of section one hundred ninety-eight-a of the general business law, the tax commission shall refund to such consumer any tax paid by the consumer on the amount of the purchase price, capitalized costs and fees and charges refunded by the manufacturer which is not in excess of the receipts and proportionate to the receipts subject to tax. All the provisions of this section shall apply to the refund authorized by this subdivision, provided, however, that a request for a refund under this subdivision shall be timely made if such request for a refund is made within three years of the date the refund from the manufacturer is received by a consumer pursuant to subdivision (c) of section one hundred ninety-eight-a of the general business law and further provided that interest allowable under subdivision (d) of this section shall be payable from the date which is three months after the date the application for refund in processible form is received."

Supreme Court, U.S.
FILED
OCT 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-382

IN THE

Supreme Court of the United States

October Term, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

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Dated: September 30, 1987

Batavia Times Publishing Co.
Batavia, New York (716) 344-2000

Question Presented

Under New York's Tax Law, whereby its motor fuel and sales taxes are to be paid by a distributor in the chain of distribution and then collected from successive purchasers ultimately to be borne by the retail purchaser, can New York compel a Pennsylvania motor fuel distributor to prepay motor fuel and sales taxes in connection with sales of motor fuel to Indians on Indian reservations, where state taxation and regulation of such sales is pre-empted by a comprehensive federal regulatory scheme, the Indian Traders Statutes, 25 U.S.C. §261 *et seq.*, and their implementing regulations, and the Indians themselves are exempt from the payment of such state taxes?

Statement of Parent, Subsidiary and Affiliated Corporations Pursuant to Rule 28.1 of the Supreme Court of the United States

Respondent Herzog Brothers Trucking, Inc. does not have any parent, subsidiary or affiliated corporations.

Listing of Parties Pursuant to Rule 34.1(b) of the Rules of the Supreme Court of the United States

Subsequent to the commencement of this action, respondent Gregory Herzog became deceased. Robert L. Herzog and Mary K. Herzog, as co-administrators of the Estate of Gregory Herzog, deceased, were substituted as parties in place of respondent Gregory Herzog and the caption of the action was deemed amended pursuant to the order of Hon. Lawrence E. Kahn, Justice of the Supreme Court, which was granted and entered on June 9, 1986 in the Supreme Court of the State of New York, Albany County. All other parties are shown in the caption.

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HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Court of Appeals of the State of New York in this case. The opinion of the Court of Appeals does not conflict with any decision of this Court, but merely applies to the facts of this case principles of federal pre-emption established by this Court.

I. Statement of the Case

This declaratory judgment action concerns the imposition by the State of New York of its motor fuel taxes and sales taxes with respect to wholesale sales of motor fuel made by a Pennsylvania distributor to the Seneca Nation of Indians, and its authorized dealers, on Indian reservations located within the State's territorial boundaries.

The underlying facts as found by the Court of Appeals are not in dispute. Respondent Herzog Brothers Trucking, Inc. (hereinafter "Herzog") is a Pennsylvania corporation engaged in wholesale and retail distribution and sales of motor fuels. In June of 1984, Herzog began wholesale distribution of motor fuel to the Seneca Nation of Indians on its Allegany and Cattaraugus reservations in New York. The motor fuel was sold to authorized Indian retail establishments on these reservations. These sales constituted Herzog's only transactions in motor fuel in the State of New York. The Seneca Indians refused to pay Herzog any state taxes on these transactions, believing themselves exempt from state regulation and taxation. In November of 1984, petitioner State Tax Commission began assessing motor fuel taxes and sales taxes against Herzog and its corporate principals. (*See* Opinion of the Court of Appeals reproduced at page A4 of the petition.)[1]

As set forth by the Court of Appeals, prior to June 1, 1985, New York's motor fuel tax was to be collected upon the first sale by a distributor, while the sales tax on motor fuel was to be collected at the time the fuel was sold to the ultimate consumer. *See*, New York Tax Law

[1] Unless otherwise noted, numbers in parenthesis preceded by the letter "A" are references to the pages of the appendix to the petition.

former Articles 12-A and 28, respectively. On June 1, 1985, the Legislature amended Article 28 of the Tax Law to impose the sales tax at the time the motor fuel is imported or first sold. *See*, New York Laws of 1985, Chapter 44, Section 20, adding Tax Law Section 1102. (Opinion of the Court of Appeals, page A4). In its opinion, the Court of Appeals summarized the relevant provisions of the current New York Tax Law as follows:

> Thus, at the present time, articles 12-A and 28 of the Tax Law impose motor fuel and sales taxes upon the importation and sale of motor fuel within the state (*see*, Tax Law §§284, 284-a, 284-c, 1101[b][4][ii], 1102, 1105). The taxes are assessed to, and collected from, the distributor and then included in its wholesale price (*see*, Tax Law §282[1]). Following purchase from the distributor, the retailer includes the tax in its retail price and passes it on to the ultimate consumer. Where the ultimate consumer is an Indian, or otherwise exempt from taxation, the taxes are refunded, or a credit is given (*see*, Tax Law §§289-c, 1139). (Opinion of the Court of Appeals, pages A4-A5).

Respondents brought this action seeking a declaratory judgment that the State of New York is without power to impose its motor fuel taxes and sales taxes on Herzog's wholesale sales to Indians on Indian reservations, and seeking a preliminary and permanent injunction against petitioners.[2] New York's Tax Law expressly provides that such taxes are to be imposed except where their collection is precluded "by the United States Constitution and the laws of the United States enacted pursuant thereto." Tax Law §284(1) (motor fuel tax); §1102(a) (sales tax).

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[2] As noted by petitioners in footnote 3 on page 4 of the petition, motor fuel and sales taxes in excess of $400,000 have been assessed against Herzog for the period through June 30, 1985.

Respondents' application for a preliminary injunction was granted (A23-A26). The petitioners appealed to the Appellate Division of the Supreme Court, which reversed (A15-A22). The majority of the Appellate Division found that respondents failed to demonstrate a likelihood of success on the merits, reasoning that the taxes assessed against respondents were a "minimal burden" permitted by law.[3]

A unanimous Court of Appeals reversed the Appellate Division and held that respondents had established, as a matter of law, a clear likelihood of success on the merits of their challenge to the petitioners' imposition of taxes on their motor fuel transactions with the Seneca Nation of Indians. The Court of Appeals held that the imposition of such taxes upon Herzog and the attempted regulation of Herzog's sales to the Indians were pre-empted by the Indian Trader Statutes, 25 U.S.C. §261, *et seq.* and their implementing regulations. *See Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980); *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

[3] The petitioners incorrectly state that the Appellate Division concluded that the New York Tax Law "... did not impose taxes upon either the respondents or the Indian retailers." (Petition, page 5.) The Appellate Division found that taxes in excess of $400,000 had already been assessed against Herzog (A17).

II. Summary of Argument

State taxation and regulation of respondents' wholesale sales to reservation Indians are pre-empted by federal law. *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980); *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

Petitioners seek to avoid the impact of the federal pre-emption doctrine by focusing their argument on certain decisions of this Court which recognize that Indian retail vendors in a chain of distribution may be required to collect a state tax from a non-Indian retail customer. *See, California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes of the Flat Head Reservation*, 425 U.S. 463 (1976). Petitioners' argue that the cases which permit a state to require an Indian retail vendor to collect a state tax imposed on his non-Indian retail customer also authorize a state to impose a tax on transactions in which an Indian trader sells solely to Indians on Indian reservations. (Petition, pages 7-10).

Petitioners' contention is incorrect. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), this Court held:

> The Indian traders statutes, 25 U.S.C. §261 *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange [citation omitted], but no similar intent is evident with respect to sales by Indians to nonmembers of the Tribe. 447 U.S. at 155-156.

Thus, a critical distinction is made between sales by businesses to Indians and sales by Indians to non-Indians. As to the former, the Indian Trader Statutes and regulations pre-empt state taxes, regulations or interference. *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980); *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965). As to the latter, the Indian Trader Statutes have no application and a state is free to impose minimal burdens upon an Indian retailer and compel him to collect and remit state taxes from his non-Indian customers. *See e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

Finding that this Court's cases construing the Indian Trader Statutes were dispositive, the Court of Appeals properly held that the petitioners could not apply New York's Tax Law to tax or otherwise regulate Herzog's wholesale sales to Indians on Indian reservations. Implicitly, the Court of Appeals held that New York's Tax Law must be applied by petitioners at the next level of distribution, to wit: sales made by the Indian retailers to non-Indian retail customers.

III. Argument

A. The Court of Appeals correctly applied federal pre-emption principles enunciated by the Supreme Court in holding that petitioners could not apply New York's tax laws to Herzog's sales to Indians.

In *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980), this Court considered a case where a non-resident corporation sold certain farm equipment to an enterprise of an Indian tribe. The state of Arizona sought to impose a transaction privilege tax on the seller corporation. It contended that it had jurisdiction to do so since the seller corporation did not maintain a place of business on the Indian reservation and that a "transaction privilege tax" upon the seller corporation was different than a "sales tax" on the transaction which would be passed on to the Indians. Arizona thus sought to distinguish the decision of this Court in *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965). There, it was held that trade with Indians on Indian reservations was governed by the Indian Trader Statutes, 25 U.S.C. §261 *et seq.*, and the detailed federal regulations enacted pursuant thereto, and that such federal law pre-empted state taxes and regulations with respect to such trade. In *Central Machinery*, this Court rejected the argument made by Arizona, and held that the Indian Trader Statutes and their implementing regulations apply to and pre-empted state taxation of a non-resident person who sells goods to Indians on an Indian reservation within a state. The Court also rejected attempts to distinguish *Warren Trading Post* on the ground that the tax being imposed was on the seller corporation and not directly passed on to the Indians. 448 U.S. at 164.

Contrary to petitioners' assertions on page 10 of the petition, this Court's decision in *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980) does not stand merely for the proposition that a "transaction privilege tax" on the privilege of doing business in a particular state is pre-empted by the Indian Trader Statutes. In *Central Machinery*, this Court reaffirmed that the Indian Trader Statutes and regulations are ". . .in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 448 U.S. at 163-164. Indeed, citing *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965), this Court further stated that "there is no room for states to legislate on the subject," and "[u]ntil Congress repeals or amends the Indian trader statutes, however, we must give them a 'sweep as broad as [their] language'." 448 U.S. at 166. Where such pre-emption is found, the prohibition against state burdens on persons trading with Indians is absolute.

Petitioners imply that no such burdens are presented in the instant case by misstating that New York's Tax Law ". . .does not impose taxes upon either the distributor or the tribal enterprise" and "[t]he taxes are assessed only against non-members of the tribe." (Petition, page 10.) However, federal pre-emption does not follow merely from the incidence of the tax, but from the existence of a comprehensive federal statutory and regulatory scheme which applies to such transactions. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), this Court held:

> Of course, the fact that the economic burden of the tax falls on the tribe does not by itself mean that the tax is pre-empted as *Moe v. Salish &*

> *Kootenai Tribes*, 425 U.S. 463 (1976), makes clear. Our decision today is based on the pre-emptive effect of a comprehensive federal regulatory scheme which like that in *Warren Trading Post Co. v. Arizona Tax Comm'n.*, 380 U.S. 685 (1965), leaves no room for additional burdens sought to be imposed by state law. 448 U.S. at 151 fn. 15.

The Indian Trader Statutes and their regulations provide such a comprehensive federal regulatory scheme. In *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965), this Court held that the purpose of these statutes and regulations was to ensure "that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or regulations promulgated under those Acts." 380 U.S. at 691.

In any event, the Court of Appeals rejected the petitioners' position regarding the assessment of New York's motor fuel and sales taxes by holding that such taxes "are assessed to, and collected from, the distributor and then included in its wholesale price (*see*, Tax Law §282[1])" and ". . .[f]ollowing purchase from the distributor, the retailer includes the tax in his retail price and passes it on to the ultimate consumer." (Opinion of the Court of Appeals, pages A4-A5.) New York's Tax Law thus provides that it is a distributor, such as Herzog, who is to bear the burden of *paying* the motor fuel and sales taxes and seeking collection of such taxes from *its* customers.[4]

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[4] The Petition also contains the following incorrect statement: "As the court below stated, the burden and legal incidence of the tax falls on the non-Indian consumer (A8)." (Petition, page 3.) The Court of Appeals, in its opinion at page A8, was merely summarizing the petitioners' contentions, not the court's decision. Petitioners have already assessed taxes in excess of $400,000 against Herzog. The Court of Appeals held that such application of New York's Tax Law imposed impermissible burdens *upon respondents* that could not be sustained (A11, A14).

Having determined that the petitioners' application of New York's Tax Law imposes burdens upon Herzog's wholesale sales to Indians on Indian reservations, the Court of Appeals correctly concluded as follows:

> The Supreme Court cases construing the Indian trader statutes are dispositive. We determine that Congress has pre-empted the field of regulating trade with Indians on reservations and has left "no room" for the application of supplementary state tax laws, such as the one here at issue, that impose "additional burdens" on Indian traders (*see, Warren Trading Post Co. v. Arizona Tax Com.*, 380 U.S. 685, 690, *supra*). Thus, no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is pre-empted by the federal trader laws and the Appellate Division erred, as a matter of law, in holding that plaintiffs had not established a "clear likelihood of success on the merits" on their application for a preliminary injunction. (Opinion of the Court of Appeals, page A14.)

The Court of Appeals, in reaching its decision, simply applied well established federal pre-emption principles enunciated by this Court to the particular facts of this case.

B. The *Moe* and *Confederated Tribes* cases do not support the petitioners' position.

Petitioners' contention that the Court of Appeals opinion is in "direct conflict" with *Moe v. Confederated Salish and Kootenai Tribes of the Flat Head Reservation*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) is incorrect. There is no such conflict.

At the outset, petitioners incorrectly state that this Court in the *Confederated Tribes* case "rejected out-of-hand the argument that federal Indian law, including the

Indian Trader Statutes, pre-empted the Washington State tax scheme." *See* Petition, page 9.

The *Confederated Tribes* case dealt with the collection of a state tax from a non-Indian retail purchaser. The operators of tribal smoke shops in *Confederated Tribes* were indeed federally licensed Indian traders. This Court held that such retailers could be compelled, notwithstanding the Indian Trader Statutes, to collect a state tax from their non-Indian retail purchasers and remit same to the State. However, this Court in *Confederated Tribes* explained *why* the Indian Trader Statutes did not govern the case before it:

> The Indian traders statutes, 25 U.S.C. §261 *et seq.*, incorporate a congressional desire comprehensively to regulate *businesses selling goods to reservation Indians* for cash or exchange, see *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), *but no similar intent is evident with respect to sales made by Indians to nonmembers of the Tribe.* 447 U.S. at 155-156. (Emphasis supplied.)

Unlike the "Indian traders" in the *Confederated Tribes* case, all of Herzog's wholesale sales are made *to* reservation Indians on Indian reservations and are thus covered by the Indian Trader Statutes. Hence, state regulation of such transactions is pre-empted by federal law. Any subsequent sales made by Indian retailers to non-members of the tribe are not so governed, and the states may impose on the Indian retailers the minimal burden of collecting a state tax from a non-Indian retail purchaser.

Also, neither *Moe* nor *Confederated Tribes* sanction pre-payment of a state tax by an Indian vendor to his wholesale supplier. Contrary to petitioners' assertion on pp. 7-8 of the petition, in *Moe* this Court did not approve the "pre-payment" provisions of the Montana's Tax

Laws but merely held that "the state may require the Indian proprietor simply to add the tax to the sales price and thereby aid the state's collection and enforcement thereof." 425 U.S. at 483. In *Confederated Tribes*, it was held that the Indian retailer could be required to affix tax stamps purchased from the state to individual packages of cigarettes at the time of sale of such cigarettes to non-members of the tribe. 447 U.S. at 159. This requirement was independent from the wholesale transaction between the Indian retailer and his supplier.

Obviously, any requirement that an Indian pay a tax to his supplier would violate the principle that Indians on an Indian reservation are exempt from paying state taxes since states may tax Indians only when Congress has manifested clearly its consent to such taxation. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985). *See also, McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

Indeed, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), this Court expressly recognized that the Indian vendors therein were not required to pay state taxes to their supplier:

> Essentially, the [district] court accepted the state's contention that the tax falls upon the first event which may constitutionally be subjected to it. In the case of sales made by non-Indians to non-Indians, this means the incidence of the tax is on the seller, or perhaps on someone even further up the chain of distribution, because that person is the one who first sells, uses, consumes, handles, possesses or distributes the products. Where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan v. State Tax Comm'n.*, 411 U.S. 164 (1973), the first taxable event is the use, consumption or possession by the non-

> Indian purchaser. Hence, as the district court concluded, the tax falls on that purchaser. We accept this conclusion. 447 U.S. at 142, fn. 9.

Most recently, in *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), this Court reaffirmed that, where an Indian vendor in a chain of distribution was untaxable, such Indian vendor could be required to collect state taxes from his non-Indian purchaser and remit same to the state. This Court has never held that an Indian trader, such as Herzog, who only makes sales to Indians, could be burdened to pre-pay a state tax in connection with such transactions. The Court of Appeals was thus manifestly correct in its holding that petitioners could not apply New York's Tax Law to tax or otherwise regulate Herzog's sales to Indians on Indian reservations.

Contrary to the petitioners' assertion that enforcement of New York's Tax Law against Herzog is necessary to "prevent the marketing of the Seneca's tax exemption to non-members of the tribe", *see* Petition, page 11, the holding of the Court of Appeals simply requires the application of New York's Tax Law by the petitioners at the next level of distribution, *i.e.* sales made by Indian retailers to non-Indian retail purchasers. Under New York Tax Law §285, Indian retailers who have received tax-free motor fuel from Herzog may be required to collect and remit the state's motor fuel and sales taxes with respect to any sales thereafter made to non-Indian retail purchasers. New York Tax Law §285 provides as follows:

> If a person, firm, association or corporation shall receive any motor fuel in such form and under such circumstances as shall preclude the collection of such tax from a distributor by reason of the constitution and laws of the United States, and shall thereafter sell any such fuel in any such manner and under such circumstances as shall subject the fuel

> sold to the taxing power of this state, such person, firm, association or corporation shall be considered a distributor with respect to such sale and shall make the same reports, pay the same taxes and be subject to all other provisions of this article relating to distributors.

Thus, the State of New York, consistent with the *Moe*, *Confederated Tribes* and *Chemehuevi* cases, could require the Indian retail vendors who have received tax-free motor fuel from Herzog to collect and remit the State's motor fuel and sales taxes with respect to any sales thereafter made to non-Indian retail purchasers.

Finally, petitioners' reference to this Court's approval in *Confederated Tribes* of the state's seizure of contraband cigarettes as support for New York's taxation of wholesale sales to Indians is misplaced. Such seizures were approved, as part of state regulation of sales by Indian retailers to non-Indian retailer purchasers, because the Indians in that case ". . . refused to fulfill collection and remittance obligations [upon them] which the State has validly imposed." 447 U.S. at 161-162. This Court expressly observed in that context that ". . . sales by wholesalers to the tribal businesses are concededly exempt from state taxation," and that ". . . cigarettes in transit [to the tribal enterprises] are as yet exempt from state taxation." 447 U.S. at 161. This Court did not authorize any burdens upon a wholesale trader, such as Herzog.

The petitioners have never sought to apply New York's Tax Law to the Seneca Indians' retail sales to non-Indian purchasers. This case deals only with wholesale sales made by Herzog to the Seneca Indians, transactions clearly within the Indian Traders Statutes and their implementing regulations.

IV. Conclusion

There is no special importance attached to the Court of Appeals decision which warrants certiorari. The Court of Appeals simply applied the decisions of this Court to the case before it. The petition for certiorari should thus be denied.

Dated: Buffalo, New York
September 30, 1987

Respectfully submitted,

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No. 87-382

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In the Supreme Court of the United States

OCTOBER TERM, 1987

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v.

HERZOG BROTHERS TRUCKING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The State of New York imposes excise and sales taxes on the sale of motor fuel. The economic burden and legal incidence of the taxes are borne by the ultimate consumer, but the wholesale distributor of the motor fuel is required to prepay the taxes upon the importation or first sale of the fuel in the State. The question presented is:

Whether the State of New York may require a non-Indian wholesale distributor of motor fuel to prepay excise and sales taxes on the importation of motor fuel into the State where the fuel is to be sold to Indian retailers on an Indian reservation for ultimate sale to both Indian and non-Indian consumers.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-382

STATE TAX COMMISSION OF THE STATE OF NEW YORK, ET AL., PETITIONERS

v.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Respondent Herzog Brothers Trucking, Inc. (Herzog), is a Pennsylvania corporation engaged in the wholesale and retail sale of motor fuel.[1] In 1984, Herzog began engaging in the wholesale distribution of motor fuel to Indian-owned retail establishments on the Allegany and Cattaraugus Indian Reservations of the Seneca Nation in New York. Those sales constituted Herzog's only motor fuel transactions in the State. Pet. App. A4.

[1] The respondents before this Court also include the principals of Herzog Brothers Trucking.

New York imposes a special excise tax and its generally applicable sales tax on the sale of motor fuel that is imported into and sold within the State, except when collection of such taxes is precluded by the Constitution or laws of the United States. N.Y. Tax Law §§ 284(1), 284-a, 284-c, 1101(b)(4)(ii), 1102(a), 1105, 1116(a)(6) (McKinney 1986, 1987 & Supp. 1988). The burden and legal incidence of the motor fuel and sales taxes fall on the ultimate consumer. However, a distributor must prepay the excise and sales taxes upon the importation or first sale of the fuel within the State. The distributor then passes the taxes on to the retailer, who in turn passes them on to the ultimate consumer. Pet. App. A8, A11, A16; N.Y. Tax Law §§ 284(1), 285-a(3), 289-c(1), (2), 1102(a), 1132(a), 1133 (McKinney 1986, 1987 & Supp. 1988).[2] Refunds may be obtained for any tax that is collected from or paid by a person or entity that is exempt from taxation (*id.* §§ 289-c, 1139 (1986 & 1987)). In accordance with this general policy, where the ultimate consumer of motor fuel is a tribal member who purchases the fuel on an Indian reservation, any taxes that have been prepaid by the distributor are subject to refund by the State. Pet. 3; Pet. App. A4-A5.[3]

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[2] Prior to 1985, the distributor was required to prepay only the excise tax; the generally applicable sales tax was collected at the time the fuel or other goods subject to the tax were sold to the ultimate consumer. Effective June 1, 1985, the sales tax was made subject to prepayment insofar as it applies to motor fuel. Pet. App. A4; 1985 N.Y. Laws 161, adding N.Y. Tax Law § 1102 (McKinney 1987). This prepayment requirement was adopted in response to tax evasion by non-Indians who went to the Reservations to purchase motor fuel from Indian retailers who believed that their operations were exempt from state taxation and therefore refused to collect the sales (or excise) tax on their retail sales. Pet. App. A16.

[3] The description in the text addresses the statutory and regulatory framework as it now exists. As we shall explain (see pages 15-16, *infra*), the State has proposed regulations that would exempt from the pre-

Respondents did not pay either the excise tax or the sales tax on the motor fuel that Herzog imported and sold to retailers on the Seneca reservations.[4] In October 1984, petitioners began to assess motor fuel and sales taxes against respondents with regard to past sales to reservation retailers. Respondents filed petitions challenging those assessments, contending that because all of Herzog's sales were to Indian retailers, they were exempt from the taxation and collection requirements. Pet. App. A5, A17.

2.a. On November 27, 1985, while administrative proceedings challenging the assessments were still pending, respondents commenced this action for declaratory and injunctive relief in the New York Supreme Court for Albany County. On December 6, 1985, the Supreme Court issued a preliminary injunction barring petitioners from determining or collecting any motor fuel or sales taxes allegedly owed by respondents with respect to fuel sold to Seneca Indians on the Seneca reservations (Pet. App. A23-A26). The court concluded that "[w]hile [petitioners] may constitutionally require the Seneca Indian vendors to assist them in collection of taxes imposed upon non-Indian purchasers (*Washington* [v.] *Confederated Tribes of* [*the*] *Colville* [*Indian Reservation*], 447 U.S. 134 [(1980)]), it may not require prepayment of the motor fuel and sales taxes by such vendors for all wholesale purchases from [respondents]. '[T]he first taxable event is the use, consumption or possession by the non-Indian purchaser.' " Pet. App. A25 (quoting *Colville*, 447 U.S. at 142 n.9).

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payment requirement that portion of a delivery of motor fuel that will be sold to Indian consumers on an Indian reservation.

[4] Respondents' refusal to prepay the taxes to the State apparently stemmed from the refusal by the reservation retailers to pay the amount of the taxes to Herzog when they made wholesale purchases of motor fuel, based on their belief that their retail operations were entirely exempt from state taxation. Pet. App. A4.

b. The Appellate Division reversed the order granting a preliminary injunction (Pet. App. A15-A22). The court noted that under this Court's decisions, a State may impose non-discriminatory taxes on non-Indian customers of Indian retailers who do business on an Indian reservation "and may further impose the 'minimal burden' of collecting the taxes from a non-Indian consumer on an Indian tribe or retailer as long as the legal incidence of the taxes falls on non-Indian purchasers" (*id.* at A18, citing *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976)). In the court's view, the "critical question" in this case is whether "the burden of total prepayment initially imposed on Herzog as the distributor, which is subject ultimately to a refund or credit if the sales have been made to exempt entities or persons, imposes a burden on [respondents] that exceeds the permissible 'minimal burden of collection' standard" (Pet. App. A18). The court concluded that respondents' application for a preliminary injunction did "not demonstrate any such excess" and that respondents therefore had failed to establish the "clear likelihood of success on the merits required for a showing of their entitlement to a preliminary injunction" (*ibid.*).

Two justices of the Appellate Division dissented (Pet. App. A19-A22). In their view, the burden imposed on the Indian retailers of prepaying the entire amount of the taxes, and only later obtaining a refund of taxes assessed on tax-exempt retail sales to Indians, was "more than the minimal burden approved by the Supreme Court," because "the Indian retailer is being deprived of his money for a period of time until he can prove it should be returned to him under this scheme" (*id.* at A20-A21). The dissenting justices continued (*id.* at A21):

> The tax on sales to Indians is preempted and thus prohibited. The taxing scheme therefore effectively requires

> [respondents] to prepay a prohibited tax. This requirement on [respondents] is also destructive of the trade relationship between Indians and their suppliers and is thus an unauthorized interference in Indian trading, an area preempted by Federal law (*see, Central Mach. Co.* [v.] *Arizona State Tax Commn.* [448 U.S. 160 (1980)]).

c. The New York Court of Appeals unanimously reversed the Appellate Division's order setting aside the preliminary injunction, holding that the prepayment requirement under the state excise and sales tax statutes is preempted by the federal Indian trader statutes, 25 U.S.C. 261-264 (Pet. App. A3-A14). The Court of Appeals acknowledged that the burden and legal incidence of the taxes rest with the ultimate consumer; that the State therefore may validly impose taxes on retail sales to non-Indian consumers; and that the State may require an Indian tribe or retailer to collect the tax on its sales to non-Indians and pay the proceeds over to the State (*id.* at A10-A11). But the court reasoned that even where a tax is imposed upon or otherwise burdens a transaction between a non-Indian customer and an Indian individual and the legal incidence of the tax falls on the non-Indian party to the transaction, it is still necessary to examine the relevant federal treaties and statutes and the policies underlying them in order to determine whether the method of collecting the state tax is constitutional. In this case, the court determined that the collection scheme impermissibly "imposes obligations on a wholesale trader to Indian retailers on Indian reservations" (*id.* at A11).

The Court of Appeals regarded the Indian trader statutes as intended to foster tribal self-government and economic development. In the court's view, those policies are not implicated in sales *by* reservation Indians to non-Indians, and such sales therefore may be subject to state sales and excise

taxes (Pet. App. A12, citing *Colville,* 447 U.S. at 155-156). By contrast, the court reasoned, those policies are implicated in on-reservation sales *to* Indians, and the Indian trader statutes therefore impose a comprehensive regime of regulation on such sales that leaves " 'no room' " for " 'additional burdens' " imposed by the state taxes (Pet. App. A13, quoting *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U.S. 685, 690 (1965) (footnote omitted)). Accordingly, because respondent Herzog is an Indian trader by virtue of its sales of motor fuel to Indian retailers on the Seneca reservations, the court believed that "no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, * * * such regulation is preempted by the federal trader laws" (Pet. App. A14). On this basis, the Court of Appeals held that respondents had shown a clear likelihood of success on the merits, and therefore were entitled to reinstatement of the preliminary injunction (*ibid.*).

DISCUSSION

The Court of Appeals gave an unduly broad preemptive effect to the Indian trader statutes insofar as it held that New York State may not require respondents to prepay the excise and sales taxes on motor fuel sold to Indian retailers for subsequent sale to non-Indian customers. In the current posture of this case, it must be assumed that under *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), and *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), the State may impose the excise and sales taxes on reservation sales of motor fuel by Indian retailers to non-Indians and may require the Indian retailers to collect the taxes and remit them to the State. The requirement that the wholesale distributor prepay those taxes and pass their burden on to the Indian retailer, who will in turn collect the taxes from the non-

Indian customer, is, in our view, a reasonable incremental burden on the Indian retailer and his non-Indian supplier.

On the other hand, because petitioners concede that retail sales to Indians are not subject to state taxation, we believe that the prepayment requirement imposes an impermissible burden on the distribution of motor fuel to Indian traders for such sales, at least where it is reasonably practicable for the State to provide for an exemption from the prepayment requirement for the estimated portion of the fuel that will be sold to Indians. Such an exemption is reasonably practicable here. Indeed, since the petition for a writ of certiorari was filed, the New York State Department of Finance and Taxation has proposed regulations that would exempt from the prepayment requirement the estimated portion of a wholesale sale of motor fuel that will be sold to Indians. We accordingly suggest that the Court grant the petition for a writ of certiorari, vacate the judgment of the Court of Appeals, and remand the case to that court for further consideration in light of the State's new position and the views expressed herein.

1. As this case comes to the Court, it presents a narrow question concerning only the *pre*payment of certain state taxes, not the validity of the taxes themselves. Respondents do not challenge the validity of the state excise and sales taxes as applied to on-reservation retail sales by Indian businesses to non-Indian consumers; they argue only that the State should be required to collect those taxes directly from the Indian retailers, not indirectly through prepayment by respondent Herzog, the wholesale distributor. See Br. in Opp. 6, 11, 13-14.[5] The New York

[5] The Indian retailers have taken the position that even their sales to non-Indians are exempt from state taxation (Pet. 3; Pet. App. A16). Presumably, the retailers (or their customers) would be free to contest the validity of the taxes by seeking a refund pursuant to available procedures under state law (N.Y. Tax Law §§ 289-c, 1139 (McKinney 1986 & 1987); Pet. App. A5), and the Seneca Nation could challenge the taxes

Court of Appeals similarly proceeded on the assumption that the excise and sales taxes are valid as applied to sales by Indian retailers to non-Indians. Pet. App. A10-A12.[6]

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in a suit brought in federal court pursuant to 28 U.S.C. 1341 (see *Moe*, 425 U.S. at 470-475).

[6] In *Moe* and *Colville*, the Court sustained the application of state taxes to the on-reservation sale of cigarettes by tribal and other Indian retailers to non-Indians. In those cases, the value marketed by the smokeshops to non-Indians coming from outside the reservation was not generated on the reservation by activities in which the tribes had a significant interest; rather the smokeshops were essentially " 'market[ing] an exemption from state taxation to persons who would normally do their business elsewhere.' " *California* v. *Cabazon Band of Mission Indians*, No. 85-1708 (Feb. 25, 1987), slip op. 15-16 (quoting *Colville*, 447 U.S. at 155). See also *Cabazon*, slip op. 16 (unlike in *Colville* and *Moe*, the tribes operating bingo facilities "are not merely importing a product onto the reservations for immediate resale to non-Indians"). See also *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985).

The retail establishments in this case may in some respects be similar to the smokeshops in *Moe* and *Colville*: the Appellate Division noted that when the Indian retailers refused to pay the motor fuel tax, "non-Indians were driving to the reservations and purchasing motor fuels and avoiding the payment of taxes" (Pet. App. A16). Moreover, in determining the validity of state taxes specifically with respect to the sale of motor fuel to non-Indians, it would be necessary to consider the application of the Hayden-Cartwright Act, 4 U.S.C. 104. That Act provides that "[a]ll taxes levied by any State * * * upon, with respect to, or measured by, sales * * * of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels" when sold by or through establishments "on United States military or other reservations" (4 U.S.C. 104(a)). The question whether the Hayden-Cartwright Act applies to Indian reservations at all was left open in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), in which the Court held that the Act was not in any event "designed to overcome the otherwise pre-emptive effect of federal regulation of tribal timber" on a reservation (448 U.S. at 152 n.16). See *Application of Federal and State Taxes to Activities of Menominee Indian Mills*, 57 Interior Dec. 129, 138-139 (1940) (concluding that the

By the same token, petitioners do not question the proposition that sales of motor fuel by on-reservation Indian retailers to Indians are exempt from the state excise and sales taxes, and that the State therefore must provide for the refund of any such taxes that have been precollected by respondent Herzog. See Pet. 3. The Court of Appeals likewise took that proposition as a given. See Pet. App. A5, A8, A10.[7] This case therefore does not furnish the Court

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Hayden-Cartwright Act does apply to Indian reservations).

In other circumstances, however, under the balancing test of preemption followed in *Cabazon* (slip op. 11-15); *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 837-840 (1982); and *White Mountain Apache Tribe*, 448 U.S. at 145, the application of state sales or similar taxes may be preempted, such as where the activity the State seeks to tax involves the generation of value on the reservation and implicates significant Indian interests. See *Indian Country, U.S.A., Inc.* v. *Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 983-987 (10th Cir. 1987), petition for cert. pending, No. 87-1068. Different considerations may also be present in the case of an Indian establishment on a reservation that engages in an ordinary retail business and does not merely cater to off-reservation non-Indians by marketing an exemption from substantial state excise taxes. See also *White Mountain Apache Tribe*, 448 U.S. at 151-152 n.16 (holding that the Buck Act, 4 U.S.C. 105 *et seq.*, which authorizes the imposition of state sales or use taxes "within a Federal area" (4 U.S.C. 105(a)), is inapplicable to Indian reservations); *Warren Trading Post*, 380 U.S. at 691 n.18.

[7] As regards state sales and similar taxes generally, this proposition of course follows from *Moe*, 425 U.S. at 480, and *Colville*, 447 U.S. at 142 n.8. The only question in the present setting would be whether the Hayden-Cartwright Act creates an exception to that general rule in the case of on-reservation sales of gasoline or other motor fuels to Indians (if that Act applies to Indian reservations at all, see note 6, *supra*). See *Menominee Indian Mills*, 57 Interior Dec. at 140 (concluding that the Act permitted taxation of gasoline sales made to Indians by the commissary of a sawmill operated by the federal government for the benefit of Indians); but cf. *Warren Trading Post*, 380 U.S. at 691 n.18 (the Buck Act does not permit application of state sales taxes to on-reservation sales to Indians).

with an occasion to consider whether the excise and sales taxes themselves may validly be imposed on retail sales of motor fuel by on-reservation Indian retailers (or other persons subject to the Indian trader laws), either to Indian customers or to non-Indian customers.

2. The only question presented, then, is the narrow one of whether the federal Indian trader statutes preempt a state law that requires a non-Indian wholesale distributor to *pre*pay the state excise and sales taxes on motor fuel delivered to Indian retail establishments on an Indian reservation. That question must be analyzed differently with respect to the portion of the fuel that ultimately will be sold to non-Indian customers and the portion that will be sold to Indian customers.

a. In our view, the New York Court of Appeals gave too broad a preemptive effect to the Indian trader statutes in holding that New York cannot require respondent Herzog to prepay the excise and sales taxes on the portion of the fuel that ultimately will be sold to non-Indians. As just explained, it must be assumed for present purposes that those taxes may lawfully be applied to the on-reservation sale of motor fuel by Indian retailers to non-Indian customers. It follows that, under *Moe* (425 U.S. at 481-483) and *Colville* (447 U.S. at 159), the State may impose the "minimal burden" on Indian retailers of aiding in the collection and enforcement of the taxes by requiring them to collect the taxes from their non-Indian customers. We believe that, at least in the absence of special circumstances, the principles of Indian law applied in *Moe* and *Colville* likewise permit a State to require, as an aspect of aiding the State in the collection and enforcement of taxes, that the Indian retailers prepay the taxes in accordance with generally applicable procedures under state law.

Indeed, in *Colville* itself, the Court explicitly held that "the State may validly require the tribal smokeshops to

affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to non-members of the Tribe" (447 U.S. at 159). The Court thus made clear that the Indian retailers could be required to prepay the cigarette tax directly *to* the State by requiring them to purchase tax stamps *from* the State prior to the sale of the cigarettes. There is no reason why the result should be any different where, as here, state law requires the retailer to prepay the tax not to the State, but to the wholesaler, which has already prepaid the tax to the State.

In *Moe*, state law in fact required the retailer to prepay the cigarette tax to the wholesaler at the time of purchase. 392 F. Supp. 1297, 1308 (D. Mont. 1975). In its opinion affirming the district court's decision in *Moe*, this Court recited the district court's holding that the State "may require a precollection of the tax imposed by law upon the non-Indian purchaser of the cigarettes" (425 U.S. at 468). The Court expressed no disapproval of this holding; it simply stated in a footnote (*id.* at 468 n.6):

> The District Court noted that the State's present statutory scheme contemplates advance payment or "precollection" of the sales tax by the retailer when he purchases his inventory from the wholesaler. Recognizing that its holding—a distinction between sales to Indians and to non-Indians—would result in "complicated problems" of enforcement by the State, the District Court deferred passing on those problems pending a decision by this Court. We, of course, express no opinion on this question.

This footnote appears to assume that the State may impose a precollection requirement on an Indian retailer with respect to on-reservation sales to non-Indians. The footnote merely acknowledges that because sales to Indians are tax-exempt and are presumptively not subject to a precollection require-

ment, "complicated problems" could arise in the administration of a precollection requirement that applies to only a portion of a wholesale delivery. Thus, *Moe*, like *Colville,* supports the proposition that general principles of preemption in this area do not, without more, bar a State from requiring an Indian retailer to prepay a valid state tax where prepayment is uniformly required of other retailers in the State. Accordingly, it is our view that the addition of the amount of the New York excise and sales taxes to the wholesale price otherwise paid by the Indian retailers to respondent Herzog for the portion of the motor fuel to be sold to non-Indians is a "minimal burden" on the retailers that can be justified under *Moe* and *Colville* as a means of preventing avoidance of the tax by the retailers or their customers. Compare *Moe,* 425 U.S. at 483.[8]

Contrary to the view of the New York Court of Appeals, we do not believe that the Indian trader statutes divest a State of whatever authority it otherwise would have under the general principles of Indian law applied in *Moe* and *Colville* to require prepayment of a valid state tax. We do not disagree with the conclusion by the Court of Appeals that wholesale sales by a non-Indian distributor to an Indian retailer on an Indian reservation are within the broad sweep of the Indian trader statutes, which apply to "[a]ny person desiring to trade with the Indians on any Indian reservation" (25 U.S.C. 262) and make it a criminal offense for

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[8] That conclusion would be especially warranted if the Hayden-Cartwright Act applies to sales of motor fuel to non-Indians on an Indian reservation, an issue on which we take no position at the present time. The Hayden-Cartwright Act permits a state tax on gasoline or other motor vehicle fuels to be levied "in the same manner" as such taxes are levied elsewhere in the State (4 U.S.C. 104(a)). The Court of Appeals might consider the application of the Hayden-Cartwright Act in proceedings on remand if it concludes that the authority of the State to require prepayment is otherwise doubtful even in light of *Moe* and *Colville.*

"[a]ny person * * * to introduce goods, or to trade * * * on any Indian reservation" without a license (25 U.S.C. 264). Compare *Central Machinery Co.* v. *Arizona State Tax Comm'n,* 448 U.S. 160, 164-165 (1980). But the core concern of the Indian trader statutes is to protect Indian customers on the reservation from exploitation; Congress has provided for comprehensive regulation of the retail trade with Indians to prevent such exploitation, and state taxes or other regulations that burden that retail trade are preempted under *Warren Trading Post* and *Central Machinery.* The Indian trader statutes do not similarly oust all state regulation of retail trade with *non*-Indians on an Indian reservation, and under *Moe* and *Colville,* even an Indian trader who is himself an Indian may be required to collect state taxes in connection with his retail trade with non-Indians. It follows that the Indian trader statutes do not preempt all state laws that touch upon the wholesale sale to a retailer who is subject to the Indian trader statutes of goods that are to be sold to non-Indian consumers—at least where the retailer is a non-Indian. We do not believe that a different result necessarily is required merely because the trader who makes retail sales to non-Indians happens to be an Indian, since his retail sales to non-Indians are not in themselves exempt from all state regulation. See *Colville,* 447 U.S. at 155-156.

In this case, the burden imposed by the State on the wholesale trade between respondent Herzog (the Indian trader) and its Indian wholesale customers on the reservation—namely, the requirement that Herzog add the amount of the state taxes to the wholesale price it otherwise charges the Indian retailers for motor fuel—is ancillary to the burden that the State may, under *Moe* and *Colville,* impose directly on the Indian retailers (despite their status as Indian traders) of prepaying the taxes to the State and collecting the taxes from their non-Indian customers. The

payment of the tax first by Herzog and then by the Indian retailers as part of their purchase from Herzog is merely the *means* by which the State imposes that prepayment requirement on Indian retailers. Especially in modern times, when a substantial number of non-Indians reside or travel on Indian reservations, we do not believe that the Indian trader statutes must be read inflexibly to bar a State from imposing this minimal and ancillary burden on the wholesale trade between a non-Indian distributor and an Indian retailer who sells to non-Indians on an Indian reservation. The distributor and the ultimate consumer are non-Indians who otherwise are subject to state regulation. Under the Indian trader statutes, the mere presence of an Indian retailer in the chain of distribution from one non-Indian to another does not constitute an insuperable barrier to a reasonable (and nondiscriminatory) state statutory scheme that provides for the passing through of liability for taxes that the State may lawfully impose on the non-Indian consumer.

There is no need for the Court to resolve this issue at the present time, however, because, for reasons we shall explain, we believe that the case should be remanded to the Court of Appeals for further consideration. If, after remand, the Court of Appeals should persist in its view that the prepayment requirement is preempted by the Indian trader statutes even as applied to motor fuel that will ultimately be sold by an Indian retailer to non-Indians, there will be time enough for this Court to review such a ruling.

b. By contrast, we doubt that the Indian trader statutes permit a State to require a distributor that delivers products to an Indian trader (or to require the Indian trader itself) to prepay sales taxes or similar taxes on products that will ultimately be sold to Indian retail customers on the reservation—if, as we must assume is true here (see pages

9-10, *supra*), the Indian trader statutes bar the imposition of the taxes on the retail sales. The Indian trader statutes and the regulations under them "would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders" (*Warren Trading Post*, 380 U.S. at 690 (footnote omitted); accord, *Central Machinery*, 448 U.S. at 165-166). A requirement that an Indian trader routinely prepay an invalid tax and then recover his prepayment only by seeking a refund under state law would seem to be such an impermissible additional burden under the comprehensive regulatory scheme imposed by the Indian trader statutes—at least where it is reasonably practicable for the State to fashion an exemption from its prepayment requirement for that portion of a wholesale sale of goods that will ultimately be sold to Indian consumers.

There is no need for the Court to resolve that question in this case, however, because since the petition for a writ of certiorari was filed, petitioners have proposed a scheme to exempt from the prepayment requirement the portion of wholesale deliveries to Indian or non-Indian retailers on Indian reservations in New York that will be sold to Indian customers. On March 8, 1988, the Commissioner of Taxation and Finance of the State of New York formally published for comment proposed regulations that would provide for such an exemption from the precollection of the motor fuel excise tax, based on several alternative methods of estimating the volume of sales by the retailers to tribal members. App., *infra*, 1a-14a. We take no position here on whether the proposed regulations fully accommodate the interests of the on-reservation Indian retail traders and their Indian customers in all particulars, but in our view the general approach of the regulations is sound. Although the proposed regulations address only the motor fuel tax, we have been informed by petitioners that they are committed

to the adoption of a comparable approach to the precollection requirement under the sales tax statute as well, and that proposed regulations under the sales tax statute have been placed on the agenda for the next meeting of the Tax Commissioner on June 22, 1988.

In addition, we have been informed by counsel for petitioners and by counsel for the Seneca Nation that they have begun negotiations to address a number of issues that have arisen concerning the application of state law (including the taxes at issue here) to reservation activities, as well as other issues arising in the relations between the Nation and the State generally. Petitioners have informed us that they regard the proposed regulations issued on March 8, 1988, as one step in this dialogue and that the eventual content of the final regulations—or other possible solutions to the questions presented by application of the State's excise and sales taxes to on-reservation sales, such as agreements between the State and the Indian tribes to share tax revenues and cooperate in the collection of their respective taxes—may be the subject of negotiations between the State and the Seneca Nation, as well as any other Indian tribes in New York that might choose to participate.[9]

In these circumstances, we suggest that the Court grant the petition for a writ of certiorari, vacate the judgment of the Court of Appeals, and remand the case to the Court of Appeals for further consideration in light of the new position advanced by petitioners in the proposed regulations, the views we have expressed herein,[10] and any additional

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[9] Petitioners have further informed us that although the period for submitting comments on the proposed regulations formally expired 45 days after their publication on March 8, 1988, the Department of Taxation and Finance has informed prospective commenters, including the Seneca Nation, that it will receive comments on the proposed regulations at least through the middle of June.

[10] A remand to the Court of Appeals also would allow that court

considerations that may arise as a result of comments on the proposed regulations and negotiations between the State and the Seneca Nation and other New York tribes. Despite the fact that the Court of Appeals rendered its decision on an appeal of a preliminary injunction that could in theory be vacated by the state courts at a later date in light of the proposed regulations or other developments, we suggest that the Court vacate the judgment below and remand for further proceedings rather than deny the petition. The decision of the Court of Appeals appears to interpose the Indian trader statutes as an absolute bar to the imposition of any prepayment requirement by the State in connection with any wholesale deliveries to Indian retailers on Indian reservations, even with respect to motor fuel that will ultimately be sold by those retailers to non-Indians. If that seemingly definitive ruling by the highest court of the State is allowed to stand, it could prove to be an impediment to negotiations and to an appropriate resolution of the controversy concerning the application of the State's excise and sales taxes to on-reservation sales of motor fuel, because the decision presumably would prevent petitioners from resolving that controversy by means of the issuance in final form of the regulations they have proposed to exempt from the prepayment requirement only the motor fuel that will ultimately be sold to Indian customers.[11]

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to consider the extent, if any, to which the Hayden-Cartwright Act applies to sales of motor fuel to Indians or non-Indians on Indian reservations. The Court of Appeals did not address the possible application of that Act in the decision under review.

[11] We agree with petitioners (Pet. 6) that the decision of the Court of Appeals, while rendered in connection with respondents' application for a preliminary injunction, is sufficiently "final" to permit review by this Court under 28 U.S.C. 1257. The Court of Appeals held that the prepayment requirement is preempted by the Indian trader statutes as a matter of law, no matter how minimal the burden it imposes (Pet. App. A14), and that ruling presumably would be binding in any fur-

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Court of Appeals should be vacated, and the case should be remanded to the Court of Appeals for further consideration in light of the views expressed herein and the new position advanced by petitioners in the proposed regulations published on March 8, 1988.

Respectfully submitted.

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JUNE 1988

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ther proceedings in state court. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 478-479 (1975).

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171 and sections 284.1, 284.3, 285, 289-c and 289-f of the Tax Law, the Commissioner of Taxation and Finance, at an open meeting held on even date with the signing of this rule, hereby proposes to make and adopt the following amendments to its regulations with respect to the Motor Fuel Tax, by amending the heading of Part 414, and section 414.1, by repealing section 414.4 and renumbering sections 414.5 and 414.6 to be sections 414.4 and 414.5, and by adding new sections 414.6 and 414.7 to Part 414 of Article 1 of such regulations, as published in Subchapter F of Chapter III of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, to read as follows:

Section 1. The heading of Part 414 of such regulations is hereby amended to read as follows:

PART 414
EXEMPTIONS FROM TAX

(Statutory authority: Tax Law, § 171; art. 12-A)

Sec.
414.1 General
414.2 Governmental entities
414.3 Qualified hospitals
[414.4 Indian nations, tribes and individuals]
[414.5] 414.4 Diplomatic missions and diplomatic personnel

[414.6] 414.5 The United Nations

414.6 Indian nations or tribes, qualified Indian consumers and registered dealers

414.7 Qualified sales of motor fuel on qualified reservations

Section 2. Subdivision (a) of section 414.1 of Part 414 of such regulations is hereby amended by deleting paragraph (4) of such subdivision (which was reserved for Indian nations, tribes and individuals), by renumbering paragraph (5) of such subdivision to be paragraph (4), and by adding a new paragraph (5) to such subdivision, to read as follows:

(5) As provided for in sections 414.6 and 414.7 of this Part, exempt Indian nations or tribes, qualified Indian consumers and registered dealers may purchase on qualified reservations – with the prior approval of the Department of Taxation and Finance, or, if applicable, of the Indian nation or tribe – motor fuel upon which the seller has not passed through the motor fuel tax imposed pursuant to article 12-A of the Tax Law.

Section 3. Section 414.4 of such Part is hereby repealed; and sections 414.5 and 414.6 of such Part are renumbered to be sections 414.4 and 414.5.

Section 4. New sections 414.6 and 414.7 are hereby added to such Part, to read as follows:

414.6 Indian nations or tribes, qualified Indian consumers and registered dealers. (Tax Law, §§ 284(1) and 289-c) (a) General. As provided for in this section and in section 414.7 of this Part, exempt Indian nations or tribes, qualified Indian consumers and registered dealers may purchase, on qualified reservations, motor fuel upon which the seller has not passed through the motor fuel tax imposed pursuant to article 12-A of the Tax Law.

(b) Definitions. (1) (i) "Qualified Indian" for purposes of this Article means a person, duly enrolled on the tribal rolls of one of the exempt Indian nations or tribes.

(ii) "Qualified Indian consumer" for purposes of this Article means a qualified Indian who purchases or intends to purchase motor fuel within the boundaries of a qualified reservation for his own use and consumption (i.e. other than for resale).

(2) "Exempt Indian nation or tribe" for purposes of this Article means one of the following New York State Indian nations or tribes: Cayuga, Oneida Indian Nation, Onondaga Nation of Indians, Poospatuck, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians.

(3) "Qualified reservation" for purposes of this Article means the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian reservation, Poospatuck Indian reservation, St. Regis Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation.

(4) "Registered dealer" for purposes of this Article means: (i) the (Indian or non-Indian) owner, lessee, or operator of a retail filling station located within the boundaries of a qualified reservation (including, but not limited to, any such person who or which has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who or which (a) registers with the Department of Taxation and Finance, and (b) makes or intends to make qualified sales of motor fuel; and,

(ii) a qualified Indian who is a subjobber, broker, or wholesale dealer (including, but not limited to, any such person who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an

exempt Indian nation or tribe), who (a) registers with the Department of Taxation and Finance, and (b) makes or intends to make qualified sales of motor fuel on a qualified reservation.

(5) "Qualified sale" for purposes of this Article means a sale of motor fuel by a registered distributor, an exempt Indian nation or tribe, or a registered dealer, made without passing through the motor fuel tax to an exempt Indian nation or tribe, a registered dealer, or a qualified Indian consumer.

(c) Exempt Indian nations or tribes. (1) In order to confirm its exempt status to sellers of motor fuel, an Indian nation or tribe, in accordance with subdivision (b) of section 529.9 of this Title, must submit to the Department of Taxation and Finance, in letter form, a request for exempt organization status, signed by the governing chief or ruling body of the Indian nation or tribe. Upon receipt of the request, the Department will issue the requesting nation or tribe a numbered exempt organization certificate. As an exempt organization, an Indian nation or tribe is subject to all of the provisions of section 529.9 of this Title.

(2) An exempt Indian nation or tribe may purchase motor fuel upon which the seller has not passed through the motor fuel tax for its own use and consumption, or for making qualified sales, provided that the nation or tribe: (i) holds a valid exempt organization certificate issued by the New York State Department of Taxation and Finance; (ii) takes delivery of the motor fuel on its qualified reservation; and, (iii) uses, or intends to use, such fuel either for its own official use and consumption, or to make qualified sales.

(3) The exempt Indian nation or tribe may purchase motor fuel upon which the seller has not passed through the motor fuel tax, by issuing to the seller of the fuel a properly completed certificate of motor fuel tax exemption

for qualified Indian tribes or nations. Such exemption certificate must disclose the Indian nation's or tribe's exempt organization number referred to in paragraph (1) of this subdivision.

(4) Failure to comply with any of the provisions of articles 12-A and 28 of the Tax Law with respect to motor fuel, or any rule or regulation pursuant to such articles, may result in the cancellation or suspension of the authority of such nation or tribe to purchase motor fuel upon which the seller has not passed through the motor fuel tax for purposes of making qualified sales.

(d) Qualified Indian consumers. (1) For purposes of determining residency for this exemption, the Allegany, Cattaraugus and Oil Spring reservations of the Seneca Nation are considered to be one reservation. Thus, a purchase of motor fuel made by a qualified Indian consumer residing on any one of these three qualified reservations and delivered to that consumer on any of the three qualified reservations of the Seneca Nation is tax exempt.

(2) A qualified Indian consumer may purchase motor fuel upon which the seller has not passed through the motor fuel tax, if such individual: (i) purchases the motor fuel for his own use and consumption; and, (ii) takes delivery of the motor fuel on a qualified reservation.

(3) A qualified Indian consumer may purchase motor fuel upon which the seller has not passed through the motor fuel tax, by issuing to the seller of the fuel a properly completed certificate of individual Indian exemption for certain taxes on property delivered on a reservation.

(e) Registered dealers. (1) Registration of dealers. Upon application, the Department of Taxation and Finance may register an applicant and issue a certificate of registration as a dealer of motor fuel to him, if the applicant:

(i)(a) is the (Indian or non-Indian) owner, lessee or operator of a retail filling station which is located within

the boundaries of a qualified reservation who makes, or intends to make, qualified sales of motor fuel, or (b) is a qualified Indian who is also a subjobber, broker, or wholesale dealer who makes, or intends to make, qualified sales within the boundaries of a qualified reservation;

(ii)(a) has no outstanding liability for any taxes or other amounts imposed pursuant to the Tax Law which has finally been determined to be due from such applicant, and (b) is properly licensed or registered for any applicable taxes (e.g., that the applicant has a valid certificate of authority for the sales tax pursuant to Tax Law section 1132(c)); and

(iii)(a) provides evidence to the Department that he has complied (or will comply) with any applicable tribal regulations and/or licensing procedures, and (b) has no outstanding liability for any applicable taxes or other sums which may be imposed by an Indian nation or tribe, and which has finally been determined to be due from such applicant.

(2) Unless so registered, or otherwise specifically provided for in this Part, no person shall sell motor fuel within a qualified reservation without payment and/or pass through of the motor fuel tax.

(3) A registered dealer may purchase motor fuel upon which the seller has not passed through the motor fuel tax for purposes of making qualified sales, provided that the registered dealer: (i) has received from the Department a valid certificate of registration; (ii) takes delivery of such fuel within the boundaries of his qualified reservation; and, (iii) uses or intends to use such fuel to make qualified sales.

(4) A registered dealer may purchase motor fuel upon which the seller has not passed through the motor fuel tax by issuing to the seller of such fuel a properly completed

certificate of motor fuel tax exemption. Such exemption certificate must indicate such dealer's registration number.

(5) Failure to comply with any of the provisions of articles 12-A and 28 of the Tax Law with respect to motor fuel, or any rule or regulation pursuant to such articles, may result in the cancellation or suspension of a registration as a dealer of motor fuel. See, section 411.7 of this Title for notifications of cancellation, suspension or refusal to register.

(f) Exemption certificates and other records. (1) The exemption certificates prescribed in subdivisions (c), (d) and (e) of this section should be completed by the purchaser and given to the seller of motor fuel upon which the tax has not been passed through, at the time of an initial purchase. A separate exemption certificate need not be given for each additional purchase of motor fuel, provided that each delivery of such fuel is substantiated as being exempt from tax with an individual bill, invoice, receipt or other form of written evidence given by the seller showing the exempt Indian nation or tribe, qualified Indian consumer, or registered dealer as the purchaser.

(2) Every bill, invoice, receipt or other form of written evidence given by the seller must indicate the quantity of motor fuel delivered, the purchase price of the fuel without regard to any exemption and the price paid or to be paid by the exempt purchaser for such fuel. In addition, such evidence of each exempt transaction must be retained by the seller; and must be signed and dated by the individual taking delivery of the motor fuel. In the case of a purchase by an exempt Indian nation or tribe, such evidence must indicate such nation's or tribe's exempt organization number. In the case of a purchase by a registered dealer, such evidence must indicate such dealer's registration number.

(3) Sellers of motor fuel upon which the tax has not been passed through must establish a system of associating these individual bills, invoices, receipts and other forms of written evidence with the applicable tax exemption certificates initially received from the purchasers.

(g) Billing and payment. All purchasers of motor fuel upon which the seller has not passed through the motor fuel tax by an exempt Indian nation or tribe, by a qualified Indian consumer, or by a registered dealer must be billed directly to such nation or tribe, consumer or dealer. Furthermore, such purchases must be paid for from the funds of such nation or tribe, consumer or dealer. Alternatively, if such nation or tribe, qualified consumer, or registered dealer substantiates its exempt status to an oil company and such oil company consents to issue a credit card to such person or entity for purposes of purchasing motor fuel, individual purchases will be charged to such credit card account as if no exemption exists. Purchases of motor fuel so charged to such an authorized credit card will then be billed to the person or entity exclusive of the taxes from which the person or entity is exempt.

414.7 Qualified sales of motor fuel on qualified reservations. (Tax Law, §§ 284(1) and 289-c) (a) General applications. (1) The motor fuel tax imposed pursuant to article 12-A of the Tax Law is not required to be paid and passed through when motor fuel is imported or caused to be imported into New York State, or produced, refined, manufactured, or compounded in the State, by a distributor for sale under any circumstances which preclude the collection of the tax by reason of the United States Constitution and any laws of the United States enacted pursuant thereto.

(2) Federal constitutional and statutory principles relating to Indian sovereignty, preempt the application of a state motor fuel excise tax to a sale of motor fuel on a qualified reservation, if such fuel is ultimately purchased on such

reservation by a qualified Indian for his own personal use and consumption. Consistent with such federal principles, sales of motor fuel on a qualified reservation to a non-Indian and non-qualified Indian are subject to the tax if the ultimate incidence of, and liability for, the tax is upon the non-Indian or non-qualified consumer. Additionally, consistent with such principles, all sales of motor fuel made within a state and outside the boundaries of a qualified reservation – regardless of whether the seller and/or the purchaser is an exempt Indian nation or tribe, a registered dealer, or a qualified Indian – are subject to the state motor fuel excise tax.

(b) Sales by registered distributors. (1) A distributor may import motor fuel or cause motor fuel to be imported into New York State without payment and pass through of the motor fuel tax, if the distributor – with the prior approval of the Department of Taxation and Finance, or, if applicable, of an exempt Indian nation or tribe – sells and delivers that fuel to: (i) an exempt Indian nation or tribe; (ii) a qualified Indian consumer; or, (iii) a registered dealer. Similarly, a distributor may produce, refine, manufacture or compound motor fuel in the State without payment and pass through of the tax, if the distributor – with the prior approval of the Department, or, if applicable, of an exempt Indian nation or tribe – sells and delivers that fuel to: (i) an exempt Indian nation or tribe; (ii) a qualified Indian consumer; or, (iii) a registered dealer.

(2) In the event that a distributor has paid or has had the motor fuel tax passed through to him and subsequently makes – with the prior approval of the Department, or, if applicable, of an exempt Indian nation or tribe – such a qualified sale, a credit or refund will be allowed that distributor in the amount of such tax.

(3) No person other than a duly registered motor fuel distributor may bring motor fuel onto a qualified reserva-

tion and sell such fuel without passing through the motor fuel tax. However, as provided in section 414.6 of this Part, subsequent qualified sales of motor fuel may be made solely on such qualified reservation. Properly completed exemption certificates must be received by all sellers of motor fuel, where the motor fuel tax has not been passed through to the purchaser.

(4) In order to administer the motor fuel tax with respect to the sale of motor fuel on qualified reservations consistently with federal constitutional and statutory principles, a registered distributor may sell and deliver motor fuel without payment and/or pass through of the motor fuel tax to an exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer; provided that such registered distributor complies with the applicable provisions of subdivisions (c) and (d) of this section with respect to approval of the amount of such fuel to be sold and delivered, and further complies with all of the requirements of this Subchapter.

(c) Approval for delivery required. (1) If an exempt Indian nation or tribe agrees with the Department to regulate, license, or control the sale and distribution within its qualified reservation of agreed upon motor fuel gallonage upon which the seller has permissibly not passed through the motor fuel tax, then a registered distributor must obtain the approval of that nation or tribe regarding the agreed upon motor fuel gallonage to be sold and delivered without passing through such tax, prior to each such sale and delivery of any such fuel on such reservation.

(2) In the absence of such an agreement regarding the sale and distribution of motor fuel gallonage upon which the motor fuel tax has not been passed through, the registered distributor must obtain the approval of the Department regarding the motor fuel gallonage to be sold and delivered

without passing through such tax, prior to each such sale and delivery of any such fuel on such reservation.

(d) Basis for approval by Department. If applicable, Departmental approval for delivery will be based upon evidence of valid purchase orders received by the registered distributor of quantities of motor fuel reasonably related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation or tribe (if such nation or tribe chooses to make qualified sales), or registered dealer.

(1) In determining such probable demand, the Department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of motor fuel within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such probable demand (e.g. records of previous sales to qualified Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment and vehicle registrations, or other statistical evidence, etc.); or,

(ii) in the absence of such regulation or such evidence, calculate such demand based upon the New York average motor fuel consumption per capita, as compiled by the New York State Department of Energy for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe (or, if such membership numbers are unavailable, by the reservation service area population, as compiled by the Bureau of Indian Affairs).

(2) In determining such trade territory, the Department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of motor fuel within its reservation, consult with such nation

or tribe regarding any evidence it may submit relating to such regulated and/or licensed sellers located on its reservation; or

(ii) in the absence of such regulation or such evidence, calculate such trade territory based upon all of the information at its disposal.

(3) In addition, the Department will also take into consideration any evidence submitted by a registered dealer relating to such probable demand and to that dealer's trade territory (e.g. a verified record of previous sales to qualified Indian consumers, evidence of the number of qualified Indian consumers located within a reasonable distance of the dealer's place of business, records indicating the percentage of such trade historically realized by the dealer, or other statistical evidence in support of the proposed transaction).

(4) In the absence of any such evidence by an exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer, the Department may restrict the total deliveries to any reservation of motor fuel, upon which the motor fuel tax has not been passed through, to an amount calculated pursuant to paragraphs (1)(ii) and 2(ii) of this subdivision.

(5) Approval for sale or delivery to an exempt nation or tribe or to a registered dealer will be denied where the Department finds that such nation or tribe, or dealer are or have been making sales in violation of this Subchapter.

(e) Credits and refunds to distributors. (1) A registered distributor selling motor fuel on a qualified reservation to an exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer, under the circumstances described in this section and section 414.6 of this Part, who has not passed through the motor fuel tax to such nation or tribe, such consumer, or such dealer, will be allowed a credit or refund in the amount of the motor fuel tax paid or assumed by, or passed through to such distributor and

not passed through to the exempt purchaser. Records sufficient to substantiate all exemptions and any credit or refund claimed on the basis of such exemptions must be maintained by the seller. See, also, Part 415 of this Title relating to refunds, credits and reimbursements.

(2) A registered distributor must report motor fuel sold to an exempt Indian nation or tribe, a qualified Indian consumer or a registered dealer in its monthly return of tax on motor fuels and may deduct the quantity so sold in arriving at the net taxable gallonage to the extent such fuel was sold without passing through to such purchasers the motor fuel tax.

(f) Limitations on sales. Exempt Indian nations or tribes, qualified Indian consumers, and registered dealers may purchase motor fuel upon which the seller has not passed through the motor fuel tax, only to the extent provided in this section and in section 414.6 of this Part. Such Indian nations or tribes, consumers, and dealers, who or which purchase motor fuel under any other circumstances must pay the motor fuel tax at the time of purchase by way of remitting the tax to the seller as part of the purchase price of the motor fuel.

Section 6. This regulation shall take effect immediately; provided, however, that the Department of Taxation of [*sic*] Finance will, during the first forty-five days after this rule is filed, register applicants who or which wish to make qualified sales of motor fuel on qualified reservations; provided, further, that the amendments of this rule which limit the sale of motor fuel, upon which the tax has not been passed through by registered distributors shall take effect on the forty-fifth day after the last day of the month this regulation is filed;

Dated: Albany, New York
March 8, 1988

/s/ RODERICK G. W. CHU
Roderick G. W. Chu
Commissioner of Taxation
and Finance

It is hereby certified that the foregoing is a true copy of a proposed amendment to the Motor Fuel Tax Regulations duly proposed by the Commissioner of Taxation and Finance pursuant to the authority contained in subdivision First of section 171, and subdivisions (1) and (3) of section 284, section 285, subdivision 3 of section 289-c and section 289-f of the Tax Law, at an open meeting held in Albany, New York on March 8, 1988.

Dated: Albany, New York
March 8, 1988

/s/ KAREN MCCARTHY-TOWNSEND
Karen McCarthy-Townsend
Secretary to the Commissioner
of Taxation and Finance

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No. 87-382

IN THE

Supreme Court of the United States

October Term, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

October Term, 1987

No. 87-382

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The brief for the United States as *amicus curiae* does not reveal that the opinion of the Court of Appeals of the State of New York is in conflict with any decision of this Court. That brief does, however, contain several erroneous assumptions and offers views which are unsupported by existing law.

I. Argument

A. The views of the United States are not supported by federal pre-emption principles enunciated by the Supreme Court.

The United States, as *amicus curiae,* proceeds upon the erroneous assumption set forth on page 10 of its brief that the "only question presented" in this case is whether respondent Herzog Brothers Trucking, Inc. ("Herzog")[1], as a non-Indian wholesale distributor, can be compelled under New York's Tax Law to prepay the State's motor fuel and sales taxes on motor fuel delivered to Indian retail establishments on an Indian reservation. New York's Tax Law is not so limited and imposes substantial other impermissible burdens upon Herzog's wholesale sales to Indians on Indian reservations.

New York's Tax Law provides that it is a distributor, such as Herzog, who is to bear the burden of *paying* the motor fuel and sales taxes and seeking collection of such taxes from its customers (Opinion of the Court of Appeals, pages A4-A5).[2] New York's Tax Law and regulations also provide comprehensive and detailed regulation of a distributor's sale of motor fuel in the State and, if enforced, would additionally burden Herzog's trade with reservation Indians. The most significant of these burdens include: (i) compliance with State requirements for registration as a distributor pursuant to New York Tax Law §283(1)(2); (ii) furnishing a bond to secure the payment of State taxes pursuant to

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[1] Pursuant to Rule 28.1, it should be noted that respondent Herzog Brothers Trucking, Inc. does not have any parent, subsidiary or affiliated corporations.

[2] Unless otherwise noted, numbers in parenthesis preceded by the letter "A" are references to the pages of the appendix to the petition.

New York Tax Law §283(3), the minimum amount of which is $50,000, and is more likely to be $100,000 as set forth in 20 New York Code of Rules and Regulations §411.2(b); (iii) compliance with State record keeping requirements set forth in New York Tax Law §§286, 286-a; and (iv) the filing of monthly returns pursuant to New York Tax Law §287. *See also,* New York Tax Law §§1134, 1135, 1136 and 1137 (providing further requirements with respect to State sales taxes).

The United States fails to mention any of these additional burdens in its brief, but each is significant.[3] The costs incurred by Herzog to comply with the special requirements of New York's Tax Law necessarily would increase the price of the motor fuel sold to its Indian customers. None of these costs would otherwise be incurred by Herzog since its only transactions in New York are its sales to Indians on Indian reservations.

The United States concedes at page 12 of its brief that "wholesale sales by a non-Indian distributor to an Indian retailer on an Indian reservation are within the broad sweep of the Indian trader statutes, which apply to '[a]ny person desiring to trade with the Indians on any Indian reservation' (25 U.S.C. 262)." That concession being made, the conclusion that state taxation and regulation of such transactions is preempted by such federal law must necessarily follow.

In *Central Machinery Company v. Arizona Tax Commission,* 448 U.S. 160 (1980), this Court reaffirmed that the Indian trader statutes and regulations are ". . .

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[3] In *Central Machinery Company v. Arizona Tax Commission,* 448 U.S. 160 (1980) this Court held that the imposition of state taxes totaling $2,916.62 on sales to Indians was an impermissible burden where the Indian trader statutes pre-empted state taxation and regulation of sales made to Indians.

in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 448 U.S. at 163-164. Indeed, citing *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965), this Court further held that "there is no room for states to legislate on the subject." 448 U.S. at 166.

After determining that petitioners' application of New York's Tax Law imposes burdens upon Herzog's wholesale sales to Indians on Indian reservations, the Court of Appeals correctly concluded that the foregoing cases of this Court construing the Indian trader statutes were dispositive:

> We determine that Congress has pre-empted the field of regulating trade with Indians on reservations and has left "no room" for the application of supplementary state tax laws, such as the one here at issue, that impose "additional burdens" on Indian traders (*see, Warren Trading Post Co. v. Arizona Tax Com.*, 380 US 685, 690 *supra*). Thus, no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is pre-empted by the federal trader laws . . . (Opinion of the Court of Appeals, page A14).

The view of the United States at page 10 of its brief that the Court of Appeals gave "too broad a preemptive effect to the Indian trader statutes" suggests that the court below misapplied established principles articulated by this Court. This is not the case. The opinion of the Court of Appeals follows in every respect this Court's directives in *Central Machinery* and *Warren Trading Post* that there is "no room" for supplementary state laws which impose "additional burdens" on sales made to Indians on Indian reservations. State laws requiring

payment of taxes, registration as a distributor, record keeping, furnishing a bond and filing of monthly returns are equally pre-empted. *Accord, White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) (state regulation, licensing and taxation of a non-Indian logging company harvesting and selling tribal lumber was pre-empted by comprehensive federal regulation).

B. The United States has not furnished sufficient reasons why this case should be remanded to the Court of Appeals for reconsideration.

The United States focuses its attention on Indian retailers who, consistent with this Court's decisions in *Moe v. Confederated Salish and Kootenai Tribes of the Flat Head Reservation,* 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), may be required to collect a state tax from non-Indian retail purchasers and remit the same to the state. The United States argues at pages 13-14 of its brief that the burdens which the petitioners seek to impose on Herzog under New York's Tax Law are "ancillary" to the burdens which the State may, under *Moe* and *Confederated Tribes,* impose on the Indian retailers with respect to their sales to non-Indians. The same argument was advanced in the court below by the petitioners and rejected by the Court of Appeals (Opinion of the Court of Appeals, pages A8, A11-A12).

The United States ignores a critical distinction articulated in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), where this Court held:

> The Indian traders statutes, 25 U.S.C. §261, *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods

> to reservation Indians for cash or exchange, *see Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), but no similar intent is evident with respect to sales made by Indians to nonmembers of the tribe. 447 U.S. at 155-156.

This distinction was found to be determinative by the Court of Appeals in this case. (Opinion of the Court of Appeals, pages A11-A12.) Herzog's sales to Indians on Indian reservations are governed by the Indian traders statutes and regulations, and there is "no room" for state laws imposing "additional burdens" on traders. The reasonableness of state burdens on sales to Indians is, of course, immaterial since all state burdens are precluded. Any subsequent sales by reservation Indians to non-Indians are not so governed, and the state is free to impose minimal burdens on the Indian retailer.[4]

The United States, on page 14 of its brief, offers its view that "especially in modern times," the Indian trader statutes should not be read "inflexibly" to bar a state from imposing burdens on the trade between Herzog and its Indian customers. But, just eight years ago, in *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980), this Court held:

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[4] With respect to an Indian retailer's sales to non-Indians, this Court in *Moe* and *Confederated Tribes* sanctioned state requirements that the Indian retailer collect a tax or purchase tax stamps from the state to be affixed to the product as a condition of the retail sale. But such requirements are totally independent from the wholesale transaction between the Indian retailer and his supplier. *See*, Respondents' Brief in Opposition, pages 10-14. Burdens which may be imposed on transactions not covered by the Indian trader statutes cannot serve as authority for the imposition of burdens on transactions clearly within the scope of the Indian trader statutes, as argued by the United States at pages 12-13 of its brief. Also, the Indian/non-Indian status of the seller is immaterial. It is the identity of the purchaser which controls the application of the Indian trader statutes.

> It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them "a sweep as broad as [their] language," [citation omitted] and interpret them in light of the intent of the Congress that enacted them [citations omitted]. 448 U.S. at 166.

The Court of Appeals expressly followed this holding. (Opinion of the Court of Appeals, pages A13-A14.)

References by the United States at pages 15-17 of its brief to petitioners' proposed regulations, some of which have been reduced to writing, negotiations by and among counsel for the petitioners and the Seneca Nation, and possible agreements between them as to the prospective collection of state taxes and sharing of revenues therefrom, are completely irrelevant to the case at bar and can have no bearing on its disposition. Herzog has already been assessed state motor fuel and sales taxes in excess of $400,000 for the period through June 30, 1985. It is inconceivable how "proposed regulations" or current negotiations three years later between the State and the Seneca Nation could, in any way, affect the outcome of this case. Neither this Court nor the Court of Appeals should be engaged in such speculation.

The Court of Appeals' decision was not based on the ultimate disposition of the motor fuel purchased from Herzog by the Indian vendors. The rationale was simply that State regulation of Herzog's sales to such Indian vendors is pre-empted by federal law. (Opinion of the Court of Appeals, pages A13-A14.) The proposed regulations do not affect the rationale of the decision below, but constitute a persistent attempt to advance a view already rejected by the Court of Appeals. Hence,

remand for reconsideration is inappropriate here.[5]

The United States, on page 17 of its brief, refers to the Court of Appeals' decision as an "impediment" to negotiations between the State and the Seneca Nation and an "appropriate resolution of controversy concerning the application of the State's excise and sales taxes to on-reservation sales of motor fuel." It is not the Court of Appeals' decision which is the "impediment," if that is the appropriate term, but, rather, the long-standing principles of federal pre-emption articulated by this Court which the petitioners, and now the United States, refuse to accept. If a prospective change is to be made, it must come from Congress. This Court, in *Central Machinery,* held that nothing short of repeal or modification of the Indian trader statutes by Congress could alter their pre-emptive effect. *Central Machinery Company v. Arizona Tax Commission,* 448 U.S. at 166.[6]

---

[5] While reconsideration may be proper where an intervening judicial decision materially affects the legal foundation of the decision appealed from, *see, e.g., Alabama v. Ritter,* 454 U.S. 885 (1981) (reconsideration ordered in light of intervening state decision in companion case involving same occurrence), it is clearly unwarranted where the intervening change is immaterial to the reasoning of the court below. Also, the proposed new regulations cannot have *ex post facto* application to the assessments which are the subject of this action. Nor is this a case involving solely prospective application of a law where intervening legislation may even render the original action moot. *See, e.g., Bureau of Economic Analysis v. Long,* 454 U.S. 934 (1981) (reconsideration ordered with respect to freedom of information request for tax records in light of intervening amendment to tax statute).

[6] The United States mentions, but takes no position as to the application of the Hayden-Cartwright Act, 4 U.S.C. §104. *See* Brief for the United States, at page 12, fn. 8. That 1936 act, which appears to sanction the imposition of state motor fuel taxes in certain instances on "United States military or other reservations," does not contain any references to Indians or Indian reservations. If it was the intention of Congress to include Indian reservations within the act, it could have easily so provided. More significantly, however, it should

(Footnote continued on following page.)

It is surprising that the United States has not even commented on an alternative mechanism currently available to the State for the collection of its motor fuel and sales taxes or whether resorting to that mechanism would be an "appropriate resolution." The holding of the Court of Appeals simply requires petitioners to enforce New York's Tax Law at the next level of distribution, *i.e.*, sales made by Indian retailers to non-Indian retail purchasers. Indeed, under New York Tax Law §285, Indian retailers who have received tax-free motor fuel from Herzog may be required to collect and remit the State's motor fuel and sales taxes with respect to any sales thereafter made to non-Indian retail purchasers. This is certainly consistent with the *Moe* and *Confederated Tribes* cases. Yet, petitioners have never

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(Footnote continued from preceding page.)

be noted that this Court in *Warren Trading Post* held that the Buck Act, 4 U.S.C. §105 *et seq.*, which sanctions the imposition of state sales and use taxes in "federal areas" did not apply to Indian reservations. *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. at 691, fn. 18. This holding has been reaffirmed by the Court. *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. at 166, fn. 5. And, in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), a case involving the assessment of a state excise or use fuel tax on a non-Indian logging company, this Court held that the Hayden-Cartwright Act "was not designed to overcome the otherwise preemptive effect of federal regulation of tribal lumber." 448 U.S. at 151, fn. 16. Since the Court in *White Mountain* equated the pre-emptive effect of federal regulation of tribal lumber with the pre-emptive effect of the Indian trader statutes, 448 U.S. at 151, fn. 15, it follows that the Hayden-Cartwright Act would not overcome the pre-emptive effect of the Indian trader statutes. The 1940 opinion of the Department of the Interior, 57 I.D. 129, referred to by the United States is of dubious relevance. For example, in that opinion, it was also the view of the Department of the Interior that purchases of cigarettes by non-Indians from Indians were exempt from state taxes, 57 I.D. at 140-141, a conclusion later rejected by this Court in *Moe* and *Confederated Tribes*.

sought to apply New York's Tax Law in this regard. Certainly, such an application by the petitioners would obviate the need for new regulations, both written and oral, continuing discussions with the United States in this regard, negotiations with the Seneca Indians and a remand of this case for "further considerations" by the Court of Appeals as the United States suggests.

II. Conclusion

The petition for a writ of certiorari should be denied.

Dated: Buffalo, New York
June 15, 1988

Respectfully submitted,

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No. 87-382 (5)

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IN THE

Supreme Court of the United States

October Term, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' RESPONSE TO MOTION OF THE SENECA NATION OF INDIANS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1987

No. 87-382

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

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RESPONDENTS' RESPONSE TO MOTION OF THE SENECA NATION OF INDIANS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The motion of the Seneca Nation of Indians for leave to file a brief *amicus curiae* should be denied. No tribal interest is adversely affected by the decision of the Court

of Appeals, which held that *the State* could not tax or otherwise regulate Herzog's sales of motor fuel to Indians on Indian reservations. Although respondents concur with the movant's request that certiorari be denied, respondents object to the consideration of proposed regulations now being reviewed by the State of New York and negotiations between the Seneca Nation of Indians and the State of New York. These matters should not affect the disposition of this case. The motion is also untimely.[1]

I. ARGUMENT

A. Proposed regulations and negotiations between the Seneca Nation of Indians and State of New York are irrelevant and immaterial.

This declaratory judgment action concerns the regulation by the State of New York and imposition of its motor fuel and sales taxes upon respondents with respect to wholesale sales of motor fuel made by respondent Herzog Brothers Trucking, Inc. ("Herzog") to Seneca Indians on Indian reservations. State motor fuel and sales taxes in excess of $400,000 have been assessed against Herzog for the period through June 30, 1985. Herzog's potential tax liability under existing law regarding sales to Indians for subsequent periods also is at issue. Thus, this case involves an existing controversy between petitioners and respondents based on past and current events and the application of the law in effect.

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[1] A motion for leave to file a brief *amicus curiae* must be filed within the time allowed for the filing of the brief in opposition to the petition for a writ of certiorari. Rules of the Supreme Court, Rule 36.1. Pursuant to Rule 22.1, that time is measured from 30 days after receipt of the petition by the respondents. The petition in this case was docketed in the Supreme Court of the United States on September 3, 1987 and received by respondents' counsel on September 5, 1987.

The motion of the Seneca Nation of Indians is based on certain proposed regulations being considered by petitioners and negotiations between the Seneca Nation and petitioners with respect to the prospective collection of state taxes. It is stated at page "ii" of the motion that certain negotiations between the Seneca Nation of Indians and petitioners ". . . may resolve the matters at issue in this case." The Seneca Nation of Indians further states that ". . . the proposed regulations should first be presented to the court below, without action by this Court," and that the effect of such proposed regulations and negotiations on tribal interests should be considered in the context of this case. But nowhere does the Seneca Nation of Indians explain how such proposed regulations or negotiations could affect the assessments previously rendered by the petitioners against Herzog or the other subject matter of this case.[2]

The decision of the Court of Appeals was not based on the ultimate disposition of motor fuel purchased by the Indian vendors from Herzog. The decision simply held that *state* taxation or regulation of Herzog's sales to such Indians is pre-empted by federal law. (Opinion of the Court of Appeals, pages 13-14 of the appendix to the petition). Thus, no tribal interests were adversely affected by the decision, only the attempted taxation and regulation of such sales by the State.

New state regulations cannot supercede the Indian trader statutes. This Court, in *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160, 166 (1980), held that nothing short of repeal or modification of the Indian trader statutes *by Congress* could alter their pre-emptive effect.

[2] Herzog has not been a participant in the negotiations between the petitioners and the Seneca Nation of Indians. The petitioners themselves have not indicated how such negotiations might be dispositive of the State's claims against respondents.

The Seneca Nation of Indians argues that it has a tax and regulatory scheme for the wholesale and retail distribution of sales of motor fuel on its reservations and that it also operates two retail facilities. The Seneca Nation apparently seeks to litigate in the context of this action the possible application of these proposed regulations to its own operations. However, a judicial determination of that issue must await an actual case or controversy between the State and the Seneca Nation of Indians.

It would be improper for this Court to sanction advisory opinions in the courts below regarding the proposed regulations so that this Court can later review such opinions. Neither the federal courts nor New York's courts render advisory opinions. *Compare Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) *with Matter of Workmen's Compensation Fund*, 224 N.Y. 13, 16 (1918).

Thus, New York's courts will not render an advisory opinion as to whether the "proposed regulations" may be constitutionally applied to the Seneca Nation's own operations. The effect of proposed regulations with respect to the future collection of taxes is not ripe for determination by any court, since there is no pending "case" or "controversy" between the State and the Seneca Nation as to such matters.

II. CONCLUSION

The motion of the Seneca Nation of Indians for leave to file a brief *amicus curiae* should be denied. However, even if such motion is granted, the petition for a writ of certiorari should be denied for the reasons set forth in respondents' brief in opposition..

Dated: Buffalo, New York
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MOTION FILED
JUN 16 1988

No. 87-382

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

STATE TAX COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Petitioners

v.

HERZOG BROTHERS TRUCKING, INC., *et al.*

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE SENECA NATION OF INDIANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1987

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v.

HERZOG BROTHERS TRUCKING, INC., *et al.*

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE SENECA NATION OF INDIANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Seneca Nation of Indians respectfully moves this Court for leave to file this brief *amicus curiae* in the above captioned case. The brief for the United States as *amicus curiae* informs the Court of proposed motor fuel tax regulations recently issued by the State Tax Commission and of pending discussions between New York State and the Seneca Nation concerning the matters at issue in this case. The brief for the Seneca Nation as *amicus curiae* sets forth the position of the Seneca Nation on these two matters. Written consent for the filing of this brief has been given by the Petitioner State Tax Commission of the State of New York and has been filed with the Clerk of this Court. Consent was not given by Respondent Herzog Brothers Trucking Inc.

The Seneca Nation of Indians is a federally recognized Indian tribe residing on the Allegany, Cattaraugus and Oil Spring Reservations. The Seneca Nation has a well organized legal system which includes a tax and regulatory scheme applicable to the wholesale and retail distribution of motor fuel on its Reservations. The Seneca Nation is now considering the State's proposed regulations and will soon inform the State of its position on these regulations and on the other state tax matters on which these parties have been negotiating. These negotiations may resolve the matters at issue in this case.

The Seneca Nation moves for leave to file this brief to suggest to the Court that the proposed regulations should first be presented to the court below, without action by this Court, and that therefore the petition for a writ of certiorari should be denied. This position is supported by prior decisions of this Court, which establish that the impact of the proposed state action on tribal interests must be considered in determining the validity of state action which may interfere with these interests. *See e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. ——, 94 L.Ed.2d 244 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

The Seneca Nation is concerned that the tribal interests implicated by the proposed new regulations will not be presented to the Court in the present posture of this case. Wherefore, the Seneca Nation respectfully requests that this motion for leave to file the attached brief *amicus curiae* be granted.

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Dated: June 16, 1988

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On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF FOR THE SENECA NATION AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE SENECA NATION

The Seneca Nation is a federally recognized Indian tribe residing on the Allegany, Cattaraugus and Oil Spring Reservations. The Seneca Nation has enacted its own tax and regulatory scheme applicable to the wholesale and retail distribution of motor fuel on its Reservations. In addition, the Seneca Nation itself operates two retail establishments which sell motor fuel and which help support the delivery of tribal services and the operations of tribal government. The State's new proposed regulations may interfere with the Seneca Nation's tax and regulatory scheme and other tribal interests in a

manner prohibited by prior decisions of the Court. As such, the Seneca Nation is vitally interested in this case.

SUMMARY OF ARGUMENT

There is no reason for the Court to grant the petition for a writ of certiorari in this case. The decision of the court below is interlocutory. It addresses the propriety of granting preliminary injunctive relief to the respondent. Recognizing this, the State has, in response to that ruling, proposed new regulations which it intends to present to the court below. Under these regulations, the State would precollect its motor fuel and sales tax on sales by Indian retailers to non-Indians. The proposed regulations are now being considered by the Seneca Nation, and have not yet been presented to the court below. Prior decisions of this Court make the impact of the proposed regulations on tribal interests a matter to be considered first in that court. If more were needed, consideration of the issues in this case by this Court is inappropriate because these issues may be settled by an agreement between the Seneca Nation and the State.

ARGUMENT

I. THE PETITION PRESENTS NO IMPORTANT QUESTION WORTHY OF CONSIDERATION BY THIS COURT

A. The Decision Of The Court Below Is Interlocutory In Nature And Accordingly The State's Proposed Regulations Should First Be Presented To That Court.

In this case, the New York Court of Appeals upheld a preliminary injunction restraining the State of New York from *precollecting* motor fuel and sales taxes on sales made by Herzog Brothers Trucking, Inc., a non-Indian distributor of motor fuels, to Indian retailers on the Seneca Indian Reservation. The Court of Appeals

held that "the only issue before us on this appeal by certified question is whether, on the motion for a preliminary injunction, plaintiffs failed to establish, as a matter of law, the requisite clear likelihood of success on the merits . . ." Pet. 6-7. This decision correctly applies the principles set forth in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1975) and other cases of this Court to the peculiar New York law.

At this interlocutory stage of the case, the petition presents no question worthy of consideration by this Court. Not only is the decision not final, there are new matters, specifically the State's proposed regulations, which have neither been presented to nor considered by the court below. Indeed, both the proposed regulations and the facts relevant to their consideration under prior decisions of this Court are matters which should first be addressed in the trial court. The trial court may then consider these matters before issuing a final decision. Finally, it may well be that the issues in this case will be settled by negotiations between New York and the Seneca Nation.

B. Under Prior Decisions Of This Court The Impact Of The Proposed Regulation On Tribal Interests Should be Considered Before This Case Is Heard By This Court

New York requires that distributors precollect motor fuel and sales taxes on all motor fuel sold to a retailer at the time of sale. Ordinarily, the retailer then presumably passes on the taxes to the ultimate purchasers. However—under prior decisions of this Court—these state taxes cannot be charged to Indian purchasers. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976). Nor may a state impose a tax collection scheme which "would to a substantial extent frustrate evident congressional purpose of ensuring that no burden shall

be imposed upon Indian traders for trading with Indians on reservations." *Warren Trading Post v. Arizona Tax Comm.*, 380 U.S. 685, 691 (1965).

The Court below, ruling on an appeal before it on a motion for a preliminary injunction, held that the State's precollection scheme could not lawfully be imposed on respondent. In response to this decision, the State has proposed new regulations under which it would precollect these taxes on sales by Indian retailers to non-Indians only. Whether the State taxes here involved may be precollected from Indian retailers in the manner proposed in the proposed regulations is an issue on which the parties should first be provided an opportunity to develop a record, showing, *inter alia*, the impact of the proposed regulations on the interests of the Seneca Nation. The relevant facts may include those which would show whether the application of the State's proposed regulations would interfere with federal and tribal interests, including those arising from the Seneca Nation's tax and regulatory scheme. *California v. Cabazon Band of Mission Indians*, 480 U.S. ——, 94 L.Ed.2d 244 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). At trial, it may also be appropriate for the court below to undertake "a particularized inquiry into the nature of the state, federal and tribal interests at stake . . . to determine whether, *in the specific context*, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) (emphasis added). *See also Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982). This determination cannot be made on the spare record presented in this interlocutory appeal.

Moreover, even if the Court were interested in reviewing an issue of this narrowness, there is no occasion to consider the issue now. The present record in this interlocutory appeal discloses no emergency or irreparable harm to the State if precollection is enjoined—as the

Court of Appeals did unanimously—until final judgment is entered in this case. The question may well be one that can adequately be resolved by lower courts. Alternatively, it may well be that the State and the Seneca Nation will resolve this case through negotiations. In these circumstances there is no sufficient reason for the Court to grant the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

D.O.L. No. 85047532

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Dated: June 21, 1988

No. 87-382

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

D.O.L. #85047532

REPLY BRIEF

The petitioners respectfully submit this brief to discuss some matters presented by respondents in their supplemental brief in opposition and by the Seneca Nation of Indians in its proposed brief *amicus curiae* in opposition to the petition, which the Seneca Nation has moved the Court for permission to file.

I. Respondents argue at Point IA of their supplemental brief in opposition that because the registration and reporting requirements of the New York Tax Law add to the cost of doing business in New York and would, if enforced against them, be reflected in the wholesale price of the motor fuel sold to their Indian customers, application of the law to them must be held to be preempted. This argument is without merit. The mere fact that the New York Tax Law touches upon the relationship between respondents and their Indian customers does not, in and of itself, require a holding of preemption. As was cogently observed by the United States in its *amicus curiae* brief, "[u]nder the Indian Trader statutes, the mere presence of an Indian retailer in the chain of distribution from one non-Indian to another does not constitute an insuperable barrier to a reasonable (and nondiscriminatory) state statutory scheme that provides for the passing through of liability for taxes that the State may lawfully impose on the non-Indian consumer" (Brief for the United States, p. 14).

Under the New York tax scheme the registration and reporting requirements which apply to all motor fuel distributors in the State, no less than the requirement that the distributor prepay the applicable excise and sales taxes, are designed to prevent the avoidance of tax by retailers and their taxable customers. Since the costs incident to such registration and reporting may be passed through and borne, as are the taxes, by the ultimate non-

Indian consumers, it follows that the inclusion of the additional amounts in the wholesale price is a "minimal burden" which, under the holdings of this Court in *Moe v. Confederated Salish and Kootenai Tribes,* 425 US 436 (1976), and *Washington v. Confederated Tribes,* 447 US 134 (1980), is entirely justified.

II. The Seneca Nation's suggestion that this case is not ripe for review is similarly without merit. The holding of the Court of Appeals, which is binding upon the lower New York courts, is that the application of the New York Tax Law to the respondents is impermissible because "no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is preempted by the federal trader laws * * *" (A14). This holding is clearly determinative of the outcome of any further State court proceedings. The Seneca Nation's assertion that the case is not yet "worthy of consideration by this Court" because the Court of Appeals' decision is "interlocutory" (Br, p 3) is flat wrong. Any delay in this Court's resolution of this case is not only unwarranted but could severely prejudice the State in its ability to collect other lawfully enacted taxes against non-Indians doing business on Indian reservations.

We believe the Solicitor General is correct in observing that the Court of Appeals "gave an unduly broad preemptive effect to the Indian trader statutes * * *" (Brief for United States, p 6), and quite properly urged this Court to grant certiorari. We believe also that this petition may be disposed of properly by vacating the judgment of the Court of Appeals and remanding the case to that Court for further consideration in light of the views expressed by the Solicitor General and of the position of the petitioners, evidenced by their newly proposed regulations.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Dated: Albany, New York
June 21, 1988

Respectfully submitted,

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